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In The

Supreme Court of the United States

October Term, 1997

RIGOBERTO SANCHEZ-VELASCO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

Does a defendant under sentence of death have a Fourteenth Amendment due process right to an evidentiary hearing on his mental competence before being permitted to withdraw his last available legal challenge to the death sentence, where material doubt as to mental competence exists?

PARTIES TO THE PROCEEDING

All of the parties appear in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Michael Bowen, as special appointed post-conviction counsel for Rigoberto Sanchez-Velasco, movant in the trial court and appellant in the Florida Supreme Court, respectfully petitions this Court to issue a writ of certiorari to the Florida Supreme Court to review the judgment in *Sanchez-Velasco v. State of Florida*, Case No. 89-511 (Dec. 4, 1997) (*per curiam*).

OPINIONS BELOW

The opinion of the Florida Supreme Court is reproduced at pp. 1-5 of petitioner's separately bound appendix. It is reported as *Sanchez-Velasco v. State*, 702 So. 2d 224 (Fla. Sup. Ct. 1997) (*per curiam*). The opinion of the Dade County Circuit Court is reproduced at pp. 6-7 of petitioner's appendix.

JURISDICTION

The Florida Supreme Court issued its final corrected mandate in this matter on December 5, 1997. This Court's jurisdiction arises under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Nature of the Case and Proceedings Below

Rigoberto Sanchez-Velasco was convicted of first degree murder in the Dade County Circuit Court. The jury voted 8 to 4 in favor of the death penalty, which the trial court then imposed. The Florida Supreme Court affirmed the conviction and sentence, and this Court refused to review that decision.

Movant filed a Rule 3.850 motion for post-conviction relief under Florida law, challenging his sentence on several grounds. The Dade County Circuit Court ultimately determined that two of those challenges merited an evidentiary hearing:

(1) That assistance of counsel with respect to the penalty phase of the trial had been ineffective because (according to movant's allegations) the private investigator employed by trial counsel had refused to gather readily available evidence relevant to mitigation of the penalty appropriate for the crime that movant was convicted of committing; and

(2) That the mental health professionals who opined about movant's mental fitness for trial had been unaware of key information relevant to their examinations, including critical aspects of his personal and medical background and the fact that while in the State's custody and at the State's direction movant had been medicated with psychotropic drugs both before and during trial.

The trial court scheduled the required evidentiary hearing for December 10, 1996. That hearing, however, never took place, because movant's professed desire to discharge his post-conviction counsel and withdraw his Rule 3.850 motion intervened.

The two post-conviction counsel who had worked most closely with movant on a personal basis were forced to withdraw from that representation when funding for their agency was cut off and they had to seek other employment. The written order allowing them to withdraw was signed on September 27, 1996.

The following month, movant expressed the desire to discharge the remaining post-conviction counsel representing him, an out-of-state volunteer who had been working with the local counsel but with whom movant had had extremely limited contact. Counsel advised the trial court of counsel's view that movant was not mentally competent to exercise judgment in that area.

On October 24, 1996, the trial court conducted a colloquy with movant, and heard counsel, on movant's request to discharge post-conviction counsel. At that colloquy movant argued that post-conviction counsel lacked the background and experience necessary to represent

movant adequately in "a capital case, which is life or death." (Oct. 24, 1996 Trans., p. 9) (All quotations from movant are a court translator's translations of movant's Spanish comments.)

The trial court asked movant to confer privately with counsel (*id.*, p. 19) , but movant emphatically refused:

> THE DEFENDANT:. . . . I suggest to Your Honor as the – you represent the law, that man is my enemy. I don't want that man two feet away from me. I consider that man my enemy. I ask Your Honor to order him to stay away from me before a misfortune could take place. I don't want an enemy of mine that I consider in my heart an enemy, I don't want him to come near me or approach me.

(*Id.*, p. 28)

After the colloquy, the trial court refused to appoint another attorney to represent movant. (*Id.*, p. 18) Movant thereupon insisted that, "I don't need an attorney. I don't want him, nor do I want any other attorney, nor have I asked the Court for any other attorney." (*Id.*, p. 19) The trial court then ordered "a full screening concerning competency" and scheduled another hearing the following day to inquire into movant's request to withdraw his Rule 3.850 challenge. (*Id.*, p. 28)

Movant's counsel asked that the person conducting the evaluation be provided with a summary of movant's comments during the hearing, specifically including the "enemy" colloquy. (*Id.*, pp. 29-30) The trial court responded:

> THE COURT: I'm wondering. I wonder if we can have the doctor here. It may be that the doctor contacts you, Mr. Bowen [movant's counsel]. . . . Maybe we can put on the order a number that you can be reached at by the doctor in order to discuss the issues. . . .

(*Id.*, p. 30)

The evaluation took place the following morning. That evaluation resulted in a six-page written opinion concluding that movant was free of any "major mental disorder. . . . thought disorder . . . [or] major mood disorder", and was "fully competent to proceed with legal matters." (Ruiz Rep., p. 5)

The Ruiz Report does not suggest, and it is not the fact, that Dr. Ruiz contacted movant's counsel for any information in connection with the evaluation. Nor does it suggest that Dr. Ruiz obtained from any other source any information about movant's paranoid outburst during the colloquy on the previous day, or about the basic inconsistency between the positions he took, or that she took any aspect of his behavior into account in arriving at her conclusions.

The trial court proceeded on the afternoon of October 25th with the further colloquy scheduled the previous day. The colloquy was not an evidentiary hearing. Dr. Ruiz did not appear at that colloquy and was not otherwise available for cross-examination about or other inquiry into her report or its conclusions.

At that colloquy, movant indicated a lack of familiarity with the details and status of his Rule 3.850 challenge. (Oct. 25, 1996 Trans., p. 37) He recognized that

withdrawing that challenge would subject him to execution. (*Id.*, pp. 37-39) When he was then asked by the trial court, "Now, is that what you want to do?", however, he responded, "I don't have any other road." (*Id.*, p. 39) To the trial court's admonition that he did, in fact, have alternatives, he responded as follows:

> THE DEFENDANT: As I explained to you yesterday, I have never had that man [movant's remaining post-conviction counsel] as an attorney. And by law, he is illegally representing me and has violated all my Rights [sic].
>
> And you, yesterday, clearly denied and specifically specified that you would not give me the Right [sic] to have an attorney – competent attorney to represent me, and given [sic] me this man who has not represented me adequately, and who is my enemy to represent me in this court.
>
> I don't believe in the justice of this country, and it's not offensive to you or anyone. But I would like for them to have the opportunity to play their game completely. And in that fashion, well, I have the Right [sic] to die in peace.

(*Id.*, p. 40)

As the colloquy continued, movant complained about the length of time his Rule 3.850 motion had been pending without action and told the trial court, "I have never been informed of that motion. I had forgotten about that motion. I don't know what the motion is about now." (*Id.*, p. 41) Told that dropping his motion would mean that he would be returned to death row, movant responded:

> THE DEFENDANT: I understand it perfectly. And as she told me, it's my desire. And I don't have any other – like you said, *I'm not competent to represent myself.* And that's what you're asking me to do; to represent myself.
>
> I have not gone to the school [sic] in the United States. I do not know the laws of the United States. And I very barely understand the language. And if I'm not going to be represented by someone, and I cannot represent myself, why am I going to waste my time?

(*Id.*, p. 42 (emphasis added))

At this point, movant's counsel requested that movant "be asked if he can have an attorney that he would be satisfied with, someone other than me, would he then wish to proceed with the 3.850 Motion?" (*Id.*, p. 44) Over the demurrer of counsel, the trial court specifically refused to make that inquiry of movant. (*Id.*, pp. 44-45) As the colloquy approached its conclusion, movant repeated his insistence that he was entitled to a competent attorney to represent him in connection with the Rule 3.850 motion:

> THE DEFENDANT: I know that Congress, the Federal Government was paying for my representation since that V.R.C. [Volunteer Lawyers Resource Center] was created. The Governor gives me the right that I be represented – 3.850 Motion, post conviction [sic], be represented by an attorney competent in capital case [sic]. It's a law. And I have a right that the Governor gives me to create V.R.C. [sic].

(*Id.*, p. 54) Following this series of exchanges and comments and a further statement by the trial court making it

clear that movant would not be provided with new, separate counsel, movant said:

> THE DEFENDANT: It's my Right [sic] to represent myself and to withdraw my 3.850 Motion. And I hope that you grant it. It's my own will, and I'm competent to make my own decisions, and that I'm thankful for your consent, but it's my decision.

(*Id.*, p. 56)

On the basis of the Ruiz Report, a 1995 evaluation of movant done in connection with a different case, and the further colloquy with movant, the trial court found movant competent to waive counsel. (Oct. 25, 1996 Trans., pp. 55-56) The trial court thereupon permitted movant to withdraw his Rule 3.850 challenge. (*Id.*, pp. 56-57)

An appeal on movant's behalf was prosecuted in the Florida Supreme Court. It was there contended, among other things, that an evidentiary hearing into movant's competence was Constitutionally required. The Florida Supreme Court rejected this contention. *See Sanchez-Velasco v. State*, 702 So. 2d 224 (Fla. Sup. Ct. 1997) (*per curiam*).

Relevant Facts

Movant was convicted of the brutal rape and murder of a young girl. Despite the horrible nature of the crime and the overwhelming evidence of guilt, the trial jury voted only 8-4 for imposition of the death penalty.

In his motion for post-conviction relief, movant presented substantial documentary and testimonial evidence

of factors that could have made a difference on a penalty decision that (in the jury's mind, at least) was so close. These included the following:

1. *Failure of trial counsel to obtain and present readily available penalty-mitigation evidence.* Movant's childhood in Cuba was strewn with traumatizing experiences that the jury could properly have taken into account in determining the penalty that should be imposed for the crime he committed. His mother was verbally and physically abusive, calling him "dirty scum" and similar names and beating him for no disciplinary reason from his earliest years. His home was a vermin-infested hovel in Cuba without running water or basic hygiene. His mother frequently left him and his siblings alone, without food, water, or money, sometimes for days at a time. His sister described one incident in which he was so hungry that he gobbled down meat that he knew to be infested with cockroaches.

When movant grew older, he was sent to boarding schools, schools for the mentally handicapped, and eventually a psychiatric hospital. The treatment to which he was subjected at the psychiatric hospital included electroshock therapy.

Mr. Sanchez-Velasco's physically and psychologically traumatic background in Cuba was known to his relatives still living there. According to the evidence presented by movant, however, the private investigator sent to Cuba by trial counsel did not make even a perfunctory effort to obtain that evidence. Instead, he told movant's sister in Cuba that movant was facing the death penalty in Florida and "that the only thing that would save her brother's

life would be 'gold & silver' (money)." When movant's sister told the investigator that she had no money to give him, he left, with no inquiry at all into movant's childhood, family life or behavior. (*Id.*)

As a result, the jury never heard facts that could never have excused the crime movant committed, but could have explained that crime as the act of a badly damaged human being rather than the cold reflex of a monster. In the same way, the mental health professionals who examined movant in an effort to determine his mental condition at the time of the crime, his competency to confess, and his fitness to stand trial were without this information.

2. *Ignorance of potentially critical facts on the part of mental health professionals who examined movant before trial and opined about his mental competence.* Movant submitted evidence that, while in jail awaiting trial, he was heavily medicated with Thorazine. Doctor Alec Whyte explained that organically brain damaged persons "often react idiosyncratically to tranquilizers and become more agitated." None of the mental health practitioners who examined movant prior to trial was aware that he had been regularly medicated with Thorazine during his detention, and none performed a standard neuropsychological examination. In the opinion of Dr. Jorge Herrera, a neuropsychologist, these gaps made the pretrial evaluations "seriously flawed and unreliable."

Movant filed his motion for post-conviction relief and the material supporting it on May 13, 1993. During the thirty-one months that ensued before the State responded, movant on at least one occasion wrote to the

Governor to request immediate execution. After colloquy, the trial judge at the time denied this request upon a determination that "the defendant is not sincere in this request" and had in fact "made his choice and that is the choice that he wants to go forward with his legal proceedings in an attempt to overturn the death warrant or to halt the execution in this case."

ARGUMENT

Review is appropriate pursuant to Supreme Court Rules 10(b) and 10(c). In the face of evidence raising substantial doubt as to movant's competence to represent himself and to withdraw his Rule 3.850 motion, and of a mental evaluation which failed to reflect consideration of that evidence, movant had a Fourteenth Amendment due process right to an evidentiary hearing into his competence. *Griffin v. Lockhart*, 935 F.2d 926 (8th Cir. 1991). The decision of the Florida Supreme Court disregards that right.

A lucid individual fully competent to handle his affairs and make important decisions would at least presumptively not demand both (1) a lawyer better equipped to press challenges to his death sentence and (2) an end to those very challenges. After colloquies on two consecutive days with movant, the trial court itself found it "hard to believe" that movant in fact wanted the literally fatal outcome that the position he was taking entailed. (Oct. 25, 1996 Trans., p. 55)

It follows that a mental health practitioner could not properly determine this individual's competence without

taking into account these simultaneous but diametrically opposed demands and the paranoid comments that accompanied movant's articulation of them; without reflecting in her report any awareness of the fact that the individual being evaluated had taken precisely opposed positions at virtually the same time on a matter that he himself described as life and death; and without even a pass at reconciling that stunning and inconvenient dissonance with the report's conclusion. Hence, once the trial court had determined that an evaluation was required, it could not constitutionally proceed without an evidentiary hearing inquiring, at a minimum, into what might politely be called substantial gaps in that evaluation's analysis.

I. LEGITIMATE DOUBT ABOUT COMPETENCY REQUIRES A SUBSTANTIVELY MEANINGFUL INQUIRY, INCLUDING AN EVIDENTIARY HEARING.

The Constitutional standard governing a criminal defendant's competency to waive counsel is the same as the standard for competency to stand trial. *Godinez v. Moran*, 509 U.S. 389, 401-02 (1993). This limitation applies with as much force at the post-conviction stage as it does before trial:

> [T]here is no federal constitutional right to either direct appeals or post-conviction review. [*citing cases*] Nevertheless, once such a remedy is granted by the state, its operation must conform to the due process requirements of the 14th Amendment. [*citing cases*]

Easter v. Endell, 37 F.3d 1343, 1345 (8th Cir. 1994).

Indeed, due process "requires a court to conduct a competency hearing on its own motion, before permitting a defendant to waive constitutional rights, *whenever* a reasonable judge would be expected to have a *bona fide* doubt as to the defendant's competence." *Moran v. Godinez*, 57 F.3d 690, 695 (9th Cir. 1994) (emphasis added). This applies specifically to the decisions both to plead guilty and to waive counsel. *See, e.g., United States v. Lewis*, 991 F.2d 524, 527 (9th Cir.), *cert. denied*, 510 U.S. 878 (1993) (competence to plead guilty); and *Harding v. Lewis*, 834 F.2d 853, 856 (9th Cir. 1987), *cert. denied*, 488 U.S. 871 (1988) (competence to waive counsel).

Where competence is legitimately in doubt, moreover, a colloquy with the defendant is not enough. Neither is a colloquy plus a facially insufficient conclusion from a mental health practitioner, which is what the record here discloses. An *evidentiary* hearing is required.

In *Griffin v. Lockhart*, 935 F.2d 926 (8th Cir. 1991), for example, the core issue was the defendant's competence to stand trial. Defendant had put his competence in issue by a pretrial motion. 935 F.2d at 927. The trial court had ordered a preliminary examination by mental health professionals, whose written report was inconclusive, noting a failure of the examiners to reach consensus about the defendant's condition. *Id.* at 927-28. This appeared to call for a more complete evaluation at the state mental hospital. When informed of this, however, the defendant complained of pain from withdrawal of medication and, against the advice of his counsel, withdrew his competency challenge. *Id.* at 928. The trial court conducted a colloquy with the defendant and then permitted him to stand trial. *Id.*

The Eighth Circuit held that the state court had failed to comply with due process requirements by permitting the defendant "to withdraw his notice and motion regarding competency, without an evidentiary hearing." *See* 935 F.2d at 929. It explained that the state court had failed to "conduct[ ] a full, fair, and adequate hearing on the subject of Griffin's competency" because

> No witnesses were called; the only medical report on Griffin was the one paragraph letter from the mental health center; apparently no attempt was made to obtain a more complete report from the mental health center; and the trial court's questioning of Griffin was very limited. . . . Although the Arkansas Court of Appeals held that Griffin's "hearing" complied with due process, we conclude that it did not.

935 F.2d at 931.

The case law thus appears to admit no legitimate doubt that the same restraints apply to movant's literally fatal decision here to abandon his post-conviction challenge to his death sentence after he was not allowed to replace the counsel representing him at that stage. As the *Griffin* court explained in a different but clearly analogous procedural context:

> [A]lthough Griffin's decision to withdraw his motion and notice (against his attorney's advice) presented a slight twist to the usual events before a trial court, it did not remove the doubt about Griffin's competency. If Griffin was incompetent at the time, his decision may not have been knowingly and intelligently made.

935 F.2d at 931. Hence, if a reasonable judge would have doubted movant's competence, an evidentiary hearing – not merely a colloquy – was required. *See generally United States v. Rodriguez*, 799 F.2d 649, 655 (11th Cir. 1986) ("As a matter of procedural due process, a criminal defendant is entitled to an evidentiary hearing on his claim of incompetency if he presents sufficient facts to create a 'real, substantial and legitimate doubt as to [his] mental capacity. . . . ' ").

II. LEGITIMATE DOUBT ABOUT COMPETENCY WAS SHOWN HERE.

The record here compels the predicating doubt that the law requires. Simultaneously believing two propositions that cannot possibly both be true is not a strong indication of mental competence. Movant at bar had already been diagnosed by Drs. Herrera and Whyte as suffering from severe mental disorders that included delusional elements. And the occasion for the October, 1996 evaluation at issue here was his simultaneous insistence that he wanted to abandon his post-conviction motion and to have the benefit of counsel who could press that motion more effectively – indeed, that he wanted to abandon that motion *because* he could not have counsel who (in his judgment) would press it competently.

These positions are in diametric contradiction. Movant did *not* say that he objected to post-conviction counsel because counsel disobeyed an instruction to abandon the motion. The thrust of his objections was in exactly the opposite direction: counsel (in movant's view)

lacked familiarity with Florida law and procedure, had little experience with criminal work in general, was not licensed to practice in Florida, and had had little contact with movant; and with his very life on the line, movant said, he deserved better counsel than that. Movant was thus saying in virtually the same breath that he wanted to abandon his motion and to have that motion pressed more effectively.

Constitutionally sufficient doubt about competence has been found on facts far less compelling than these. *See Drope v. Missouri*, 420 U.S. 162, 180 (1975) (factors to be considered in determining whether legitimate doubt has been raised include irrational behavior by the accused, demeanor of the accused at trial, and prior medical opinions); *see, e.g., Blazak v. Ricketts*, 1 F.3d 891, 894-97 (9th Cir. 1993) (opinion explaining affirmance by equally divided court of district court order granting writ of habeas corpus) (documented history of mental illness and behavior characteristic of psychopaths sufficient to trigger competency hearing requirement).

Significantly, the State's position below strongly reinforces this argument. The State did *not* interpret movant's position as a sincere, intelligent, and knowing bid to drop his Rule 3.850 challenge. The State viewed movant's request as an attempt to delay ultimate disposition of his motion by manipulating the system as (according to the State) he had done before. (Oct. 25, 1996 Trans., pp. 49-51) With an evidentiary hearing on the merits of his motion in prospect, the State argued, movant was trying to gum up the works procedurally in an effort to force indefinite delay of that hearing.

Accepting the State's interpretation of events would virtually compel reversal of the decision appealed from. If the State is right, movant neither prefers execution to normal completion of the post-conviction process, nor has an intelligent and genuine understanding of the consequences of abandoning that process. Movant, according to the State, has such limited and imperfect understanding of his rights and of the systemic context in which those rights must be exercised that he believes he will *delay* his execution by purportedly asking to expedite it.

If that contention were accepted, then movant's withdrawal of his Rule 3.850 petition might be many things; but it would not and could not possibly be a knowing and intelligent surrender of a known right. If the State is correct, then movant has no more business representing himself in this matter than an eight-year old child would.

In the affirmance challenged by this petition, the Florida Supreme Court relied heavily on the fact that movant had been mentally evaluated many times, in many contexts, in connection with this case, and had always been found fit to proceed. (Decision at 2) That reliance is misplaced.

The trial court itself, which conducted the colloquy and was in the best position to observe movant's demeanor at the critical moment, determined that a further evaluation was necessary before movant could be allowed to proceed. The prior evaluations were a matter of record. Indeed, the trial court had previously ruled that movant's challenge to some of those very evaluations merited exploration at an evidentiary hearing. The trial court nevertheless concluded, when confronted with

movant's behavior at the time he actually made the decision at issue, that it could not rely on the prior evaluations and would have to have a further examination conducted.

The Florida Supreme Court suggested that the trial court did this merely in an abundance of caution. (Decision at 5) The trial court, however, specifically said that the Ruiz Report was among the factors it was relying on. In any event, moreover, it would be idle to suggest that movant's behavior at the time of the colloquy itself – and therefore well after all of the other evaluations – did not raise legitimate and substantial doubt as to his competence.

The Ruiz Report passes in discreet silence over the glaring anomalies inhering in movant's behavior. It makes no mention of them. Its evaluation displays no awareness of them. And its conclusion is not reconciled with them.

Analytically and empirically, the Ruiz Report is limited to an assurance that movant knows withdrawal of the motion will mean his execution and wants such execution. It simply does not address his impassioned plea, less than twenty-four hours before, for more effective help in avoiding that execution. While assuring readers that no evidence of major mental disorders appeared, moreover, the report does not mention movant's insistence that his own counsel was his "enemy" and his warning that physical proximity to counsel might result in "misfortune."

Conceptually, although not very plausibly, it might be possible to confront these facts candidly and reconcile

them with a finding of mental competence. What is plainly impossible is to make a credible determination in that area while disregarding those facts altogether. Indeed, the trial court itself seemed to anticipate attention to precisely these facts when it asked movant's counsel to make himself available for consultation with Dr. Ruiz, and further suggested the possibility that Dr. Ruiz would be in court for the post-evaluation colloquy. Dr. Ruiz, however, preferred to arrive at her conclusions without the intrusion of inconvenient (but highly relevant) data.

III. AN EVIDENTIARY HEARING PERMITTING MEANINGFUL INQUIRY INTO THE DEFICIENCIES IN THE RUIZ REPORT WAS CONSTITUTIONALLY REQUIRED UNDER THE CIRCUMSTANCES HERE.

Even if, in the teeth of these flaws, the Ruiz Report could conceivably be used as some part of the basis for a judicial decision, it could not be so used without the elementary safeguard of an evidentiary hearing probing its deficiencies. Without such a hearing, the decision appealed from cannot survive the trial court's acknowledged reliance on the Ruiz Report.

Although the factual picture here is of course not identical to *Griffin*, the analogies are compelling and the application of the pertinent standard is clear.

* There was no evidentiary hearing, just as there was none in *Griffin*.

* The mental evaluation upon which the trial court chose to rely purported to reach a conclusion but,

as discussed above, ignored such patently pertinent data that it should not be credited at all, much less given conclusive effect to the exclusion of the abundance of contrary opinions shown by the record. The federal courts have warned emphatically about the Constitutional pitfalls lurking in "[m]echanical application of a rule that considers only the most recent report" in this area, because such an approach "could lead to the exclusion of highly probative evidence of present incompetence that may be contained in past reports." *United States v. Caplan*, 633 F.2d 534, 539 (9th Cir. 1980).

* The trial court's colloquy here was not as limited as the one in *Griffin*, but it left substantial doubt about movant's understanding of the nature of the challenges still available for him to press or the potential consequences of pressing them successfully. Ultimately, in fact, movant said that he did *not* understand the Rule 3.850 motion that he was dropping, and insisted that he was *not* competent to represent himself.

On this basis, the evaluation relied on by the lower court was inherently dubious; the trial court's failure to conduct an evidentiary hearing is fatal to the sustainability of its order allowing withdrawal of movant's post-conviction challenge; and the Florida Supreme Court's affirmance of that order is misguided. The disposition below was accordingly erroneous and merits review by this Court.

———————◆———————

CONCLUSION

For the reasons outlined above, counsel respectfully requests on behalf of movant that the decision and order of the Florida Supreme Court be reviewed by this Court and, upon such review, reversed.

Dated this 29th day of January, 1998.

Respectfully submitted,

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App. 1

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IN THE

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APPENDIX TO
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TO THE SUPREME COURT OF FLORIDA

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Supreme Court of Florida

RIGOBERTO SANCHEZ-VELASCO,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

No. 89,511

[December 4, 1997]

PER CURIAM.

Michael Bowen, special appointed post-conviction counsel for Rigoberto Sanchez-Velasco, files this appeal of the trial court's order discharging Bowen and dismissing Sanchez-Velasco's Florida Rule of Criminal Procedure 3.850 challenge. We have jurisdiction. Art. V, § 3(b)(1), (7),

Fla. Const. For the reasons expressed, we affirm the order of the trial court. In so holding, we do not mean to imply any improper conduct or ineffective assistance by Bowen as pro bono counsel in this matter. It is clear he has proceeded in an ethical and professional manner in his representation of Sanchez-Velasco.

A thorough discussion of the underlying facts of this case is contained in *Sanchez-Velasco v. State*, 570 So. 2d 908 (Fla. 1990), *cert. denied*, 500 U.S. 929 (1991). In summary, Sanchez-Velasco resided with Marta Molina in Hialeah. On December 12, 1986, Molina left her eleven-year-old daughter in the care of Sanchez-Velasco. Molina returned home from work that evening to find that her daughter had been murdered. Sanchez-Velasco was not at the apartment. The victim's face was swollen, and she was naked and bleeding from her vagina. A medical examination concluded that the victim was raped and that strangulation was the cause of her death. Missing from Molina's apartment were the victim's gold chains, her identification bracelet, and Molina's fur coat. Sanchez-Velasco was located by the police and questioned about the murder. Following proper *Miranda*[1] warnings, Sanchez-Velasco confessed to robbery, rape, and murder. Sanchez-Velasco also remarked that he would prefer to be executed immediately rather than "rot in jail." The jury found Sanchez-Velasco guilty of first-degree murder, sexual battery of a victim under twelve years of age, and theft as a lesser included offense of grand theft. Upon the conclusion of the penalty phase, the jury recommended the death penalty by a vote of eight to four, and the judge

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

imposed a sentence of death for the first-degree murder conviction.

In his sentencing order, the trial judge found the following two aggravating circumstances: (1) the capital felony was especially heinous, atrocious, or cruel, and (2) the capital felony was committed while the defendant was engaged in the commission of a sexual battery. The judge found no statutory or nonstatutory mitigating circumstances. The judge explained in his order why he did not find Sanchez-Velasco's mental condition to be a mitigating circumstance. Following his trial, this Court affirmed the convictions and death sentence and the United States Supreme Court denied certiorari review.

Sanchez-Velasco's competency to stand trial and waive certain rights was evaluated numerous times during the proceedings below. A pretrial mental health examination demonstrated that Sanchez-Velasco was competent at the time of the crime and competent to stand trial. A competency evaluation ordered by the trial judge during the trial again demonstrated that Sanchez-Velasco was competent to stand trial. During the penalty phase, a defense psychiatrist testified that Sanchez-Velasco suffered from an emotional disturbance, but was legally sane. Prior to sentencing, a second defense psychiatrist testified that Sanchez-Velasco possibly suffered from a neuropsychological dysfunction, but was legally competent at the time of the examination. By the conclusion of the trial, Sanchez-Velasco had been examined by no less than eight mental health experts, all of whom found him to be competent to proceed.

After his convictions and sentences were affirmed. Sanchez-Velasco filed a rule 3.850 motion for post-conviction relief, challenging his convictions and sentences on sixteen grounds. Sanchez-Velasco also underwent additional competency evaluations. In support of the rule 3.850 motion, the defense retained Dr. Jorge Herrera and Dr. Alec Whyte to evaluate Sanchez-Velasco. Drs. Herrera and Whyte determined that Sanchez-Velasco suffered from significant psychological disorders. The defense planned to present the doctors' testimony at the rule 3.850 hearing to rebut the previous competency determinations. During this same time period. Sanchez-Velasco underwent a competency evaluation by Dr. Richard Greer in connection with a separate murder trial in Broward County. Dr. Greer found Sanchez-Velasco competent in that case to represent himself and enter a guilty plea.

On August 29, 1996, a hearing was held before a new trial judge on Sanchez-Velasco's rule 3.850 motion and the judge ordered an evidentiary hearing on two of the claims raised in the motion. On October 24, 1996, Sanchez-Velasco moved to discharge his post-conviction counsel, Michael Bowen. Sanchez-Velasco claimed that Bowen could not effectively represent him because Bowen had only minimal contact with him, was not familiar with Florida law, and primarily practiced civil law. Sanchez-Velasco referred to Bowen as his "enemy," and asked the judge to force Bowen to stay at a distance from him "before a misfortune could take place." Sanchez-Velasco also sought to have his rule 3.850 motion withdrawn and his execution expedited. This was not the first time Sanchez-Velasco had sought to end his post-

conviction appeals. On March 31, 1994, and again on April 28, 1994, Sanchez-Velasco wrote to Governor Lawton Chiles, requesting that no further appeals be undertaken on his behalf. On June 20, 1995, Sanchez-Velasco wrote to the Governor a third time seeking to have his post-conviction appeals waived and his death warrant signed. Sanchez-Velasco's own attorneys endeavored to ensure that none of the requests were honored.[2]

Immediately following Sanchez-Velasco's motion, the trial judge questioned Bowen and determined that he was not ineffective in his representation. The judge then told Sanchez-Velasco that she would not appoint another attorney to represent him, and that he could either represent himself or continue with Bowen as his attorney. Sanchez-Velasco responded. "The reason I'm here right now is because I don't need an attorney. I don't want him, nor do I want any other attorney, nor have I asked the Court for another attorney." The judge stated, "He appears very intelligent to me," but ordered an emergency competency evaluation before she ruled on whether Sanchez-Velasco could represent himself and waive his appeal. The next day, Dr. Sonia Ruiz personally interviewed and evaluated Sanchez-Velasco. She then issued a four-page, single-spaced report to the judge. Dr. Ruiz did not personally testify as to her conclusions. Her conclusions are summarized in the report as follows:

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[2] Sanchez-Velasco was initially represented by Bowen and two attorneys from the Volunteer Lawyer's Resource Center (VLRC). The VLRC attorneys withdrew from the case prior to the hearing on Sanchez-Velasco's motion to discharge Bowen and withdraw his post-conviction appeal.

> It is this evaluator's opinion that this defendant is fully competent to proceed. He has a factual and rational understanding of the proceedings. He has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding. He appreciates the possible consequences of his decisions. He has the ability to manifest appropriate courtroom behavior. He has the capacity to testify relevantly in his behalf. There is no major mental illness noted. No overt thought disorder was present at the time of this examination. The defendant does not appear to suffer from a major mood disorder, such as major depression. He has no cognitive deficits. There are no apparent neurological deficits. His thoughts are clear and related in a coherent fashion. He did not express any suicidal or homicidal ideations. His affect and mood were deemed to be appropriate. No major mental illness or defect is deemed to be present that could interfere with his capacity to reasonably assist counsel or himself in his defense. No psychiatric interventions are deemed to be necessary at this time.

On October 25, 1996, the trial judge questioned Sanchez-Velasco to determine if he understood the consequences of waiving his post-conviction counsel and proceedings. The judge explored Sanchez-Velasco's age, education and employment history. The judge asked if Sanchez-Velasco understood that if he prevailed on the rule 3.850 motion he would be entitled to a new sentencing hearing. Sanchez-Velasco replied that he understood. The judge explained that by withdrawing the rule 3.850 motion his right to any further appeals would be forever lost, and again recommended that he represent himself or

allow Bowen to represent him. Sanchez-Velasco stated that he understood the judge would not appoint another attorney for him, and that he did not want Bowen to serve as his attorney. Sanchez-Velasco then told the judge, "It's my right to represent myself and to withdraw my 3.850 motion. And I hope that you grant it. It's my own will, and I'm competent to make my own decisions, and that I'm thankful for your consent, but it's my decision."

On the basis of Dr. Ruiz's evaluation, the 1995 evaluation by Dr. Greer, and the colloquy, the trial judge found Sanchez-Velasco competent to dismiss his counsel and withdraw his rule 3.850 motion. The judge's order concluded as follows:

> The Court finds that the Defendant is well-aware and fully understands the consequences of his actions. The Court further finds that the Defendant has sufficient mental capacity, education and life experience to appreciate the nature of the proceedings and the consequences of withdrawing the Rule 3.850 and in representing himself.
>
> The Court finds the Defendant has freely, voluntarily, knowingly and intelligently waived his right to counsel for his collateral appeal. The Court further finds the Defendant, representing himself, has intelligently and knowingly moved to withdraw his Motion for Post-Conviction Relief and that the Defendant has the "right to control his own destiny to whatever extent remains." *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993) at 484.

Bowen, Sanchez-Velasco's former counsel, now appeals the trial judge's order. Bowen claims that Dr.

Ruiz's competency evaluation, upon which the trial judge's order was based in part, was facially deficient and Sanchez-Velasco was actually incompetent to represent himself and withdraw his rule 3.850 motion. Bowen asserts that Sanchez-Velasco's competency was placed in legitimate doubt at the hearing of October 24, 1996, when he simultaneously demanded to (1) dismiss Bowen due to ineffectiveness in pressing his post-conviction appeal and to (2) withdraw his post-conviction appeal. Bowen contends that Sanchez-Velasco's incompetence is demonstrated by the fact that his two demands are in diametric contradiction. Bowen claims it was this contradiction that likely prompted the trial judge to order Sanchez-Velasco's competency evaluation. Bowen asserts that the report submitted by Dr. Ruiz was insufficient because it failed to discuss or analyze this evidence of Sanchez-Velasco's incompetency. Bowen concludes that the order of the trial court cannot be sustained because it is based in part on the deficient competency report. We disagree that Dr. Ruiz's report was deficient and find no reasonable basis for any doubt concerning Sanchez-Velasco's competency to dismiss his attorney and withdraw his post-conviction motion.

A waiver of collateral counsel and proceedings must be knowing, intelligent, and voluntary. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Durocher v. Singletary*, 623 So. 2d 482, 485 (Fla. 1993). In *Durocher*, in a similar situation, we said:

> Competent defendants have the constitutional right to refuse professional counsel and to represent themselves, or not, if they so choose. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L. Ed. 2d 562 (1975); *Hamblen v. State*, 527 So.

> 2d 800 (Fla. 1988). If the right to representation can be waived at trial, we see no reason why the statutory right to collateral counsel cannot also be waived.

623 So. 2d at 483. Under *Durocher,* when a defendant expresses a desire to dismiss his or her collateral counsel and proceedings, the trial judge must conduct a *Faretta*-type[3] evaluation to determine that the defendant understands the consequences of his or her request. *Id.* at 485. If the *Faretta*-type evaluation raises a doubt in the judge's mind as to the defendant's competency, the judge may order a mental health evaluation and determine competency thereafter. *Id.* If the *Faretta*-type evaluation raises no doubt in the judge's mind as to the defendant's competency, no mental health evaluation is necessary for the competency determination. *Id.*

The trial judge fully followed the procedure outlined in *Durocher* in determining Sanchez-Velasco's competency to proceed. Following Sanchez-Velasco's motion, the judge thoroughly explored his education and experience, and repeatedly stressed the implications of dismissing his collateral appeal. The judge determined that Sanchez-Velasco appeared to be "very intelligent" and "very competent." The record discloses that the judge then ordered the competency evaluation, not because she had a reasonable doubt as to Sanchez-Velasco's competency, but in an abundance of caution because Sanchez-Velasco was requesting to be put to death. The evaluation conducted by Dr. Ruiz was comprehensive and responsive to the needs of the trial court. Dr. Ruiz inquired about Sanchez-

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[3] *Faretta v. California,* 422 U.S. 806 (1975).

Velasco's childhood, education, employment history, religious beliefs, criminal history, relationship with his attorney, and decision to expedite his execution. Dr. Ruiz concluded in the report:

> Overall, this defendant presents as an individual who is fully competent to proceed with legal matters. There is no major mental disorder noted. There is no thought disorder, nor any major mood disorder evidenced at this time. He is able to reason properly, without any mental illness or defect interfering with his capacity to assist counsel or himself in his defense.

Upon receiving the report, the judge stated that Dr. Ruiz's findings and conclusions supported her own belief that Sanchez-Velasco was competent to make his own legal decisions. Dr. Ruiz's evaluation was consistent with nine other competency determinations. The judge's determination of competency was also supported by the fact that Sanchez-Velasco arrived at the hearing with a presumption of competence attributable to the previous determinations of his competency. *See Whitmore v. Arkansas*, 495 U.S. 149 (1990); *Hunter v. State*, 660 So. 2d 244 (Fla. 1995); *Durocher*, 623 So. 2d at 484. The judge then discharged Bowen as Sanchez-Velasco's counsel and dismissed the rule 3.850 motion.

Bowen argues that Dr. Ruiz's report failed to expressly address the alleged contradictions between Sanchez-Velasco's claim that his counsel was ineffective in pressing his appeal and his request to withdraw his appeal. We find that, to the extent such a contradiction may exist, it does not in and of itself lead us to doubt Sanchez-Velasco's competence in the face of at least ten

evaluations determining him to be competent. Our decision in *Durocher* requires a mental health evaluation only when the *Faretta*-type evaluation leaves the judge with doubts as to the defendant's competency. Here, the record discloses that the judge had no such doubts but merely ordered the evaluation in an abundance of caution. In effect, she was making certain her conclusions were correct as well as consistent with prior competency determinations.

Our decision in *Durocher* controls the issues in this appeal. Accordingly, we affirm the order of the trial court discharging Sanchez-Velasco's post-conviction counsel and dismissing his rule 3.850 motion.

It is so ordered.

KOGAN, C.J., and OVERTON, SHAW, HARDING and WELLS, JJ., and GRIMES, Senior Justice, concur.

ANSTEAD, J., recused.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

STATE OF FLORIDA

vs.

RIGOBERTO SANCHEZ-VELASCO
Defendant

CASE NO: 86-37102
JUDGE: Platzer

ORDER TO TRANSPORT DEFENDANT FOR EVALUATION

THIS CAUSE having come to be heard before this Court, upon the motion of the State Attorney of the Eleventh Judicial Circuit of Florida to return the defendant for the purpose of post-conviction proceedings in the above-styled cause, and the Court being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Director of Dade County Corrections and Rehabilitation Department, be and he is hereby directed to take custody of Rigoberto Sanchez-Velasco, the defendant, in the above-styled case, DC#088795, date of birth January 4, 1959, who is presently incarcerated on death row at Florida State Prison, Starke, and to safely return him to the Dade County Jail, on or before the ___ day of October, 1996; and the Director of the Division of Corrections of the State of Florida, is hereby directed to deliver up the person of the said prisoner to the custody of the Director of the Dade County Department of Corrections and Rehabilitation, taking proper receipt therefore, in order to effectuate the provisions hereof.

DONE AND ORDERED at Miami, Dade County, Florida, this the ___ day of September, 1996.

VICTORIA PLATZER
CIRCUIT COURT JUDGE

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

STATE OF FLORIDA,	CRIMINAL DIVISION 17
vs.	JUDGE VICTORIA PLATZER
RIGOBERTO SANCHEZ-VELASCO,	CASE NO. F86-37102
Defendant.	

_____/

ORDER GRANTING COUNSEL'S MOTION TO WITHDRAW

Having reviewed the motion of Jennifer Greenberg and Anne Jacobs, *pro bono* counsel for Defendant Rigoberto Sanchez-Velasco, and being fully advised in the premises, it is hereby

ORDERED that for the reasons set forth in counsel's Motion to Withdraw and more fully set forth at the August 29, 1996 telephonic hearing in this matter, the Motion to Withdraw as Counsel is hereby **GRANTED.** All future pleadings shall be directed to Attorney for Defendant, Michael Bowen, at Firstar Building, 777 E. Wisconsin Avenue, 39th Floor, Milwaukee, WI 53202-5367.

Dated this 27 day of September, 1996.

/s/ Victoria Platzer
VICTORIA PLATZER
Circuit Court Judge

cc: Anita Gay
Mike Bowen
Jennifer Greenberg
Anne Jacobs
Rigoberto Sanchez-Velasco

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

STATE OF FLORIDA v.
RIGOBERTO SANCHEZ-VELASCO, Defendant

Case No. 86-37102
Judge Platzer

ORDER COMPELLING PRODUCTION OF TRIAL COUNSEL'S FILES

This matter having come before this Court upon motion of the State of Florida renewing its request to compel the Defendant's present counsel, Michael Bowen, to produce for inspection, the files of former trial counsel, Joel Hirschhorn, and this Court having been advised in the premises, hereby orders defense counsel to produce the files of former trial counsel [which are in his possession /s/ VP] to the State of Florida on or before October 8, 1996.

DONE AND ORDERED at Miami, Dade County, Florida, this the 15th day of ~~September~~ [October], 1996.

/s/ Victoria Platzer
VICTORIA PLATZER
CIRCUIT COURT JUDGE

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

STATE OF FLORIDA v. RIGOBERTO SANCHEZ-VELASCO,
Defendant

Case No. 86-37102
Judge Platzer

ORDER ALLOWING DISCOVERY

This matter having come before this Court upon motion of the STATE OF FLORIDA to Allow Discovery, and this Court having been fully advised in the premises, hereby orders as follows:

Both the Defense and the State shall provide the following to opposing counsel:

i. a written list of names and addresses of all witnesses whom the defense expects to call as witnesses at the hearing;

ii. the statement and/or reports of any person listed above, not previously provided in the appendices to the motion for post-conviction relief; and

iii. any tangible papers or objects that the defendant intends to use in the hearing or trial.

All discovery shall be provided on or before November 12, 1996. Further, both parties shall be permitted to depose witnesses of the opposing party prior to the evidentiary hearing scheduled for December 10, 1996.

DONE AND ORDERED at Miami, Dade County, Florida, this the 15 day of ~~September~~ [October], 1996.

/s/ Victoria Platzer
VICTORIA PLATZER
CIRCUIT COURT JUDGE

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

STATE OF FLORIDA v.

RIGOBERTO SANCHEZ-VELASCO,
Defendant

CASE NO: 86-37102
JUDGE: Platzer

ORDER COMPELLING PRODUCTION OF MEDICAL RECORDS

It is hereby ORDERED, pursuant to Section 395.3025(4)(d) Florida Statute, that Department of Corrections and/or Florida State Prisons produce and send notarized copies of any and all medical records pertaining to the treatment and care of RIGOBERTO SANCHEZ-VELASCO, DC3088795, DOB 1-4-59, to Office of the State Attorney, 1350 Northwest 12th Avenue, Miami, Florida 33136.

DONE AND ORDERED at Miami, Dade County, Florida, this 15TH day of ~~September~~ [October], 1996.

/s/ Victoria Platzer
VICTORIA PLATZER
CIRCUIT COURT
JUDGE, IN AND FOR
DADE COUNTY, FLORIDA

STATE OF FLORIDA,	IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA
vs.	
RIGOBERTO SANCHEZ-VELASCO,	
Defendant.	CRIMINAL DIVISION 17
	JUDGE VICTORIA PLATZER
	CASE NO. F86-37102

ORDER GRANTING EVIDENTIARY HEARING

THIS CAUSE came before this Court on or about June 13, 1996 on Defendant's, RIGOBERTO SANCHEZ-VELASCO, Motion to Vacate Judgment of Conviction and Sentence. The Court, having reviewed the pleadings, portions of the record and having heard argument of counsel, hereby grants an evidentiary hearing as to the following claims:

1. Claim III wherein the Defendant claims ineffective assistance of counsel during the penalty phase. Defendant claims that mitigating evidence was available but not presented by counsel and that such evidence if presented would have affected the outcome of the jury's recommendation.

2. Claim V alleging that the Defendant was incompetent to stand trial. An evidentiary hearing shall be held to determine if the evaluating psychiatrists and psychologists would have reached a different conclusion as to competency had they been more aware of the Defendant's background or had they been aware Defendant

was receiving psychotropic medications both prior to and during the trial.

This matter is hereby set for evidentiary hearing on December 10, 1996 at 11:00 a.m. in Courtroom 2-10.

The Court further orders the Department of Corrections to transport the Defendant to Court for the hearing on December 10, 1996.

DONE AND ORDERED at Miami, Dade County, Florida, this 25 day of October, 1996.

[Nunc Pro Tunc Aug. 29, 1996. /s/ VP]

/s/ Victoria Platzer
VICTORIA PLATZER
Circuit Court Judge

Copies furnished to:
Department of Corrections
Michael Bowen, Attorney for Defendant
Anita Gay, Assistant State Attorney

STATE OF FLORIDA,	IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA
vs.	
RIGOBERTO SANCHEZ-VELASCO,	
Defendant.	CRIMINAL DIVISION 17
	JUDGE VICTORIA PLATZER
	CASE NO. F86-37102

ORDER SUMMARILY DENYING DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF (AS TO ALL CLAIMS, EXCEPT III AND IV)

THIS CAUSE came before this Court on or about June 13, 1996 on Defendant's, RIGOBERTO SANCHEZ-VELASCO, Motion to Vacate Judgment of Conviction of Sentence. The Court, having reviewed the pleadings, portions of the record and having heard argument of counsel, hereby finds and orders as follows:

1. Claim I, regarding the Defendant's right to files and records requested pursuant to Fla. Statute 119, is rendered moot in that all items which were requested were ordered produced by this Court on June 13, 1996. Additionally, Defendant was allowed until July 30, 1996 to file any amended pleadings necessitated by those records. No amended pleadings were filed and any requests for files or records not produced are deemed waived.

2. Claim II, alleging ineffective assistance of counsel, is denied. The following claims are conclusively refuted by the record:

a. involuntariness of confession (R. 87-93, 273, 289-552);

b. mental health examination (R. 39-41, 43-45, 1680, 1793-94, 1908-22, 2186-2200)[1];

c. failure to impeach witness (R. 1479-88, 1571, 1578-79, 2239-40);

d. concession of guilt (R. 855-1070, 2309-55, 2417-37, 2766-87).

Defendant's claim that counsel was ineffective for failing to conduct an inquiry concerning one of the jurors is denied in that the record supports that defense counsel was exercising strategic options which do not support an ineffective assistance of counsel claim (R. 857-61).

3. Claim IV, alleging ineffective assistance of counsel because Counsel did not prevent Defendant from testifying during the penalty phase, is denied as the claim is conclusively refuted by the record. (R. 2693-2704) Even if not so refuted, Defendant's waiver of his right not to testify is an issue which could have been or should have been raised on direct appeal. Defendant cannot couch such a claim in terms of ineffective assistance of counsel in order to defeat the appellate process.

4. Claim VI, alleging that the Defendant was denied a competent mental health examination and that counsel

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[1] The record clearly indicates that not only was the Defendant evaluated prior to trial, but during trial as well. Additionally, the Defendant was evaluated by a psychiatrist and psychologist pursuant to Fla. R. Crim. P. 3.216.

was thereby ineffective, is denied in that it is procedurally barred as an issue which could have been or should have been raised on direct appeal. *Woods v. State*, 531 So.2d 79 (Fla. 1988). Additionally, Defendant's claim is conclusively refuted by the record (R. 39-45).

5. Claim VII, alleging that jury instructions at the penalty phase were unreasonably vague and confusing, is denied in that it is procedurally barred as an issue which either could have been or should have been raised on direct appeal on the judgment and sentence. *Harvey v. Dugger*, 650 So.2d 982 (Fla. 1995).

6. Claim VIII, alleging that the State withheld favorable material in violation of *Brady v. Maryland*, 373 US 83 (1963), is denied in that the Defendant has failed to show that had the allegedly undisclosed evidence been provided there is a reasonable probability the result of the trial would have been different. *Roberts v. State*, 568 So.2d 1255 (Fla. 1990).

7. Claim IX, alleging an improper doubling of aggravating factors, is denied in that it is procedurally barred as an issue which either could have been or should have been raised on direct appeal of the judgment and sentence. *Meeks v. Dugger*, 576 So.2d 713 (Fla. 1991); *Agan v. State*, 560 So.2d 222 (Fla. 1990).

8. Claim X, regarding recent studies concerning the jury instructions, is denied as an issue which is not cognizable in post-conviction proceedings. *Witt v. State*, 387 So.2d 922 (Fla. 1980).

9. Claim XI, alleging that the Prosecutor's improper arguments denied him of a fair trial, is denied in that it is

procedurally barred as an issue which either could have been or should have been raised on direct appeal of the judgment and sentence. *Woods v. State*, 531 So.2d 79 (Fla. 1988); *Breedlove v. Singletary*, 595 So.2d 10 (Fla. 1992); *Kight v. Dugger*, 574 So.2d 1072 (Fla.1990).

10. Claim XII, alleging that trial court failed to weigh mitigating evidence, is denied in that it is procedurally barred as an issue which was raised on direct appeal of the judgment and sentence. The claim was rejected by the Supreme Court. *Sanchez-Velasco v. State*, 570 So.2d 916 (Fla. 1990).

11. Claim XIII, alleging that the State failed to notify Defendant of his right to inform the Cuban Consulate of his arrest, is denied in that it is procedurally barred as an issue which either could have been or should have been raise on direct appeal of the judgment and sentence. Additionally, Defendant has failed to allege that even if the consulate had been notified, it would have reasonably affected the outcome of the trial. As such, his allegation does not constitute a claim justifying post-conviction relief. *See United States v. Mirza*, 45 F.3d 428 (4th Cir. 1995).

12. Claim XIV, alleging that the trial court should have suppressed Defendant's statements, is denied in that it is procedurally barred as an issue which was raised and rejected on direct appeal of the judgment and sentence. *Sanchez-Velasco v. State, supra*, at 913-914.

13. Claims XV, alleging the failure of appellate counsel of obtain files and XVI, alleging that the cumulative impact of judicial error denied Defendant a fair trial, is denied in that it is a legally insufficient claim which

does not demonstrate entitlement to relief. *Kennedy v. State*, 547 So.2d 912 (Fla. 1989).

The Defendant is hereby notified that he has thirty (30) days in which to appeal this order to the Third District Court of Appeal.

DONE AND ORDERED at Miami, Dade County, Florida, this 30 day of October, 1996. Nunc Pro Tunc August 29, 1996.

/s/ Victoria Platzer
VICTORIA PLATZER
Circuit Court Judge

Copies Furnished To:
Rigoberto Sanchez-Velasco, Defendant
Michael Bowen, Attorney for Defendant
Anita Gay, Assistant State Attorney

STATE OF FLORIDA, vs. RIGOBERTO SANCHEZ-VELASCO, Defendant.	IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION 17 JUDGE VICTORIA PLATZER CASE NO. F86-37102

ORDER DISCHARGING COURT-APPOINTED COUNSEL, GRANTING DEFENDANT'S MOTION TO WITHDRAW RULE 3.850 AND ORDERING DEFENDANT TRANSPORTED

THIS CAUSE came before this Court on October 24, 1996 and October 25, 1996 on the Defendant's, RIGOBERTO SANCHEZ-VELASCO, ora tenus Motion to discharge court-appointed counsel and Motion to Withdraw Motion for Post-Conviction Relief. The Court, hereby finds and orders as follows:

1. After conducting an appropriate inquiry pursuant to *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973), the Court finds that Defendant's counsel was not ineffective in his representation of Defendant. Defendant's counsel has in fact been involved in the presentation of the Rule 3.850 motion since its inception and participated in the filing of pleadings and memorandums, as well as attending and arguing motions.

2. The Court ordered an emergency evaluation of Defendant to determine competency in light of the Defendant's request to discharge counsel and represent himself. The evaluation confirmed the Court's belief, after

speaking with Defendant, that the Defendant is not only competent, but intelligent and well-aware of his legal situation.

3. In light of the finding of competency to proceed, the Court then conducted a *Faretta* inquiry to determine if the Defendant was competent to knowingly and intelligently waive his right to counsel. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525 (1975). The Defendant was advised of the consequences not only of representing himself, but also of withdrawing the Rule 3.850 motion.

The Court finds that the Defendant is well-aware and fully understands the consequences of his actions. The Court further finds that the Defendant has sufficient mental capacity, education and life experience to appreciate the nature of the proceedings and the consequences of withdrawing the Rule 3.850 and in representing himself.

The Court finds the Defendant has freely, voluntarily, knowingly and intelligently waive his right to counsel for his collateral appeal. The Court further finds the Defendant, representing himself, has intelligently and knowingly moved to withdraw his Motion for Post-Conviction Relief and that the Defendant has the "right to control his own destiny to whatever extent remains." *Durocher v. Singletary*, 623 So.2d 482 (Fla. 1993) at 484.

WHEREFORE, the Court hereby grants Defendant's motion to discharge his attorney and discharges Michael Bowen as the attorney for Defendant. The Court further ~~o~~rders that Defendant's Motion to Withdraw the Motion for Post-Conviction Relief is granted.

The Director of the Dade County Corrections and Rehabilitation Department is directed to immediately return the Defendant, RIGOBERTO SANCHEZ-VELASCO, D.C. #088795, to death row at the Florida State Prison, Starke.

DONE AND ORDERED at Miami, Dade County, Florida, this 30 day of October, 1996.

/s/ Victoria Platzer
VICTORIA PLATZER
Circuit Court Judge

Copies furnished to:
Department of Corrections
Rigoberto Sanchez-Velasco, Defendant
Michael Bowen, Attorney for Defendant
Anita Gay, Assistant State Attorney

[logo]
1611 N.W. 12th Avenue
Miami, Florida 33136-1094

Jackson Memorial Hospital

FORENSIC SERVICE
JACKSON MEMORIAL HOSPITAL

October 25, 1996

Clerk of the Circuit Court
Criminal Division
1351 NW 12th Street
Miami, FL 33125

RE: SANCHEZ-VELASCO, RIGOBERTO

86-37102

The Forensic Service evaluation of the above named individual was completed at the DADE COUNTY JAIL on 10/25/96 as court ordered for felony charges.

The order was signed by Judge PLATZER.

The evaluation was performed by Dr. RUIZ.

A copy of the report is attached.

Respectfully,

The Forensic Service

REPORT OF PSYCHIATRIC EVALUATION	SANCHEZ, RIGOBERTO SANCHEZ-VELASCO, RIGOBERTO
FORENSIC SERVICE	37 Y/O WHITE MALE
JACKSON MEMORIAL HOSPITAL	#86-37102

IDENTIFYING DATA AND REASON FOR EVALUATION:

Rigoberto Sanchez-Velasco is an allegedly 37 year old, white Cuban male evaluated at the Dade County Jail on October 25, 1996 in connection with charges of first degree murder, sexual battery, robbery and burglary. Presently the defendant is seen in order to determine competency to proceed with legal matters.

SUMMARY AND CONCLUSIONS:

It is this evaluator's opinion that this defendant is fully competent to proceed. He has a factual and rational understanding of the proceedings. He has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding. He appreciates the possible consequences of his decisions. He has the ability to manifest appropriate courtroom behavior. He has the capacity to testify relevantly in his behalf. There is no major mental illness noted. No overt thought disorder was present at the time of this examination. The defendant does not appear to suffer form a major mood disorder, such as major depression. He has no cognitive deficits. There are no apparent neurological deficits. His thoughts are clear and related in a coherent fashion. He did not express any suicidal or homicidal ideations. His affect and mood were deemed to be appropriate. No

major mental illness or defect is deemed to be present that could interfere with his capacity to reasonably assist counsel or himself in his defense. No psychiatric interventions are deemed to be necessary at this time.

HISTORY AND EXAMINATION:

The defendant entered the interview situation willingly and behaved appropriately throughout the same. The evaluation was conducted in Spanish and lasted approximately one and a half hours. Questioned as if he was aware of the purpose of this evaluation, the defendant responded affirmatively. He indicated that it was ordered because of his desire to decline his rights for an appeal. He stated that he has been on death row for the past 10 years and that his lawyer wanted to appeal his death sentence. He related that this evaluation was to make sure that he was capable of understanding the proceedings and was reasoning correctly. He indicated that today at 2:00 P.M., the judge would make a decision. He mentioned Motion 3.850, calling it a Post Conviction Motion. He stated that he used to have two female defense attorneys whom he was satisfied with. He spoke well of these attorneys. They worked for the Voluntary Law Assessment Center. He states they no longer have the funds to continue that program and that he now has a new defense attorney by the name of Bowen. He is not satisfied with Mr. Bowen's services. He believes that he has not respected the rules of the Florida Bar. He describes him as cynical and incompetent. He states he is not familiar with capital cases. He feels his attorney is friendly with the prosecutor in this case. He indicates that in four years he has not done anything positive in his

case. He does not want Mr. Bowen to represent him. He feels that he does not need him, although he expressed that he himself is not an expert in legal matters and could not represent himself as well as a good lawyer. He understands that if he declines this appeal, the governor could sign his execution order at any moment. "He could execute me whenever he pleases." He talked about being innocent of the original allegations against him. He also talked about having murdered two other inmates in the patio of the prison. He stated that this was in self defense. He reports that he murdered both persons on the same day. He indicated that the knife involved belonged to one of them, Charlie Street. He talked about having spent one and a half years shackled at the Florida State Prison. He denied any ideas of harming others. He indicated that as long as they are not aggressive with him, he is able to get along well with others and has made several friends in prison. However, he indicates that if someone is coming after him, he would act in self defense.

The defendant talked about how during the first few years that he was incarcerated he was extremely sad and cried a lot. However, he states that he has learned to adapt to prison life. He talked extensively about how he perceives the system to be unfair, particularly towards poor people who don't have enough money to pay a good private attorney. He realized that if he were to win an appeal and extend his execution, there was always the possibility that a next governor or a future president would do away with the death penalty. He was conscious that there was always some hope that things would change. However, he indicated a desire to end his suffering. He stated that as long as he is locked up in a small

cell, he considers it to be a physical and mental torture. "As long as I am alive, I will continue to suffer. There is no reason to continue with it. I want to rest in peace." He talked about how he has no family visitors, nor anyone particularly interested or that would miss him. He states that there really was no reason to continue living in such a state. He described the conditions of his small cell. He indicated that he would not kill himself and thought it would be a stupid act on his part. He claims that he has thoroughly thought about his situation and has made a decision not to appeal. He indicated that he knows he has committed many crimes, but he still feels he is innocent of the initial murder charge. He briefly talked about religion and indicated he has eventually lost his faith. However, he did say that if there was "something up there" this being would be fair and realize he is innocent. He indicates that he is fully conscious and aware that if he does not appeal the governor can sign the execution order at any time. He admitted to previous involvement with the criminal justice system, indicating that he had been arrested on four prior occasions for things such as falsifying checks and dealing in illegal drugs. He further stated that he was due in court this afternoon at 2:00 P.M. He reminded me that my conclusions should be given to the judge prior to that time.

Background information reveals that the defendant was born on January 4, 1959 in Cuba. He came to the United States in 1980, via Marial. One of his brothers accompanied him on that trip. He reports himself as single and is not sure as to whether he has any children. He indicated he would rather not discuss that matter. He reports an equivalent of college education, although he did not

graduate. He states he was a technician, designing and assembling cars. He also studied to be an electrician. He indicated that during his early years, he did not like school and would not study and skipped classes. As a consequence of his behavior problems, he was taken to a Children's Ward at Mazorra. He states that he spent a total of two and a half years at that facility. He refused to serve in the military forces and as a consequence was sent to a military hospital for approximately three years. "It was either prison or you play like you 'you are crazy.' " He was given some 15 electroshock treatments. He also states he was treated with a medication, which he believes is a minor tranquilizer. After those three years he was allowed to return home with his family, where he continued to work assembling cars.

The defendant is the youngest of seven children. He resided with his mother in Cuba. He does not know his father, as he abandoned the family and left Cuba for the United States when the defendant was approximately one year old. He does not know of any other family members which might have suffered from a mental illness. He has two sisters and one brother that reside in the United States. He denies a history of either sexual, physical or emotional abuse. He also denies receiving special benefits from the government, other than some help that his sister obtained when he first arrived from Cuba. He denies the use of illegal drugs or alcohol, but admits that he was a drug dealer. He does talk about drinking large quantities of alcohol as a child, from the age of five until 10. He states he would gamble with grown men to see who could drink more. He indicates that he was able to drink up to five gallons of pure alcohol and had no effects from

it. He claims that when he was approximately 10 years old he stopped drinking and never resumed the habit again.

The defendant denies any psychiatric hospitalizations in the United States. Nevertheless, he states that from 1986 until 1988 he was treated at the Dade County Jail. He was prescribed Thorazine. He indicates that he was unable to sleep and believed the medication helped to control his emotions and his tendency to act out in an aggressive manner. He was guarded and declined to answer questions regarding a past history of auditory and visual hallucinations. He denied current perceptual disturbances. He indicates that he has not taken psychotropic medications since 1988. He does admit that once in a while he will request some Sinequan, in order to be able to sleep well.

He denied any suicidal ideations or attempt. He also denied any ideas of hurting others, as long as they don't hurt him.

Questioned about significant medical problems, the defendant indicated that he is generally a healthy individual. He denied suffering from any major physical illness. Questioned about head trauma, the defendant indicated that in 1982 he was assaulted by some individuals that came in his apartment to steal drugs from him. He is not sure if he was shot in the head. As a consequence, he suffered a skull fracture. He had exploratory surgery at Jackson Memorial Hospital. He claims to have been in a coma for approximately three to four days. They told him small fractions of bone encrusted around the cornea area. They told him that if he had a blood clot

he could eventually lose his vision or even his life. He left the hospital against medical advice and never returned for treatment. He indicates that he has suffered constant headaches for approximately 14 years and that the medication given to him does not make them go away.

At the time of this evaluation, the defendant presented as a clean and neatly groomed individual who appeared somewhat older than his stated age of 37. He was sporting a red jumpsuit. His hands were shackled. Initially, he appeared to be somewhat guarded, but as the interview progressed he became more relaxed and friendly. He was alert and maintained good eye contact. His affect was appropriate. His mood was normal. There was no gross memory deficit noted. He spoke clearly. His thoughts were related in a organized and coherent manner. He was fully oriented in all three spheres. His fund of general information was adequate for the purpose of this evaluation. He demonstrated a capacity for abstract thinking. He appeared to be in very good contact with reality. He has insight into the nature of his problems and his judgment is deemed to be good. He seems to be functioning within a high average to superior level of intelligence.

Overall, this defendant presents as an individual who is fully competent to proceed with legal matters. There is no major mental disorder noted. There is no thought disorder, nor any major mood disorder evidenced at this time. He is able to reason properly, without any mental illness

or defect interfering with his capacity to assist counsel or himself in his defense.

/s/ Sonia I. Ruiz
Sonia I. Ruiz, Psy.D.
Clinical Psychologist
JMH, Forensic Service

SIR/bd

COMPETENCY EVALUATION INSTUMENT

Resident/Number /s/ Sanchez, Rigoberto
Date 10/25/96

1. Appreciation of the charges or allegations. Assessment of the accused's understanding or literal knowledge of the charges or allegations. It is important that he understands he is being accused, the consequences of which may be detrimental to him.

___UNACCEPTABLE ___QUESTIONABLE

X ACCEPTABLE ___NOT APPLICABLE

2. Appreciation of the range and nature of possible penalties, if applicable, which may be imposed in the proceedings against him. Assessment of the accused's concrete understanding and appreciation of the conditions and restrictions which could be imposed on him and how long these may endure.

___UNACCEPTABLE ___QUESTIONABLE

X ACCEPTABLE ___NOT APPLICABLE

3. Understanding of the adversary nature of the legal process. Does the accused understand that (a) the responsibility of his attorney is to assist him, (b) the State Attorney's responsibility is to prove his guilt, and (c) the Judge is impartial and protects his rights as well as those of the State and (d) the jury is impartial.

___UNACCEPTABLE ___QUESTIONABLE

X ACCEPTABLE ___NOT APPLICABLE

4. Capacity to disclose to his attorney facts pertinent to the proceedings at issue. Assessment of the accused's capacity to give a consistent, rational, and relevant account of the facts surrounding his alleged offense or the accusations against him. Intelligence, perceptual capacity, memory, and validity of any claimed amnesia should be assessed. Consideration should be given to potential disparity between what he may disclose to a clinician and what he may share with his attorney.

___UNACCEPTABLE ___QUESTIONABLE

X ACCEPTABLE ___NOT APPLICABLE

5. Ability to manifest appropriate courtroom behavior. Assessment of his current behavior and probable behavior when exposed to the stress of courtroom proceedings. Evaluate his beliefs and attitude toward the judicial system.

___UNACCEPTABLE ___QUESTIONABLE

X ACCEPTABLE ___NOT APPLICABLE

6. Capacity to testify relevantly. Assessment of the accused's ability to testify with coherence, relevance, and independence of judgment including both cognitive and affective factors which may impact his ability to communicate.

__UNACCEPTABLE __QUESTIONABLE

X ACCEPTABLE __NOT APPLICABLE

Conclusions:

Fully competent

Evaluator/Title: /s/ Sonia Ruiz, PsyD

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT, IN
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

Case No. F86-37102

(JUDGE PLATZER)

STATE OF FLORIDA,)
Plaintiff,)
vs.)
RIGOBERTO SANCHEZ-VELASCO,)
Defendant.)
_____ /

Transcript of Proceedings had and taken before the Honorable VICTORIA PLATZER, as Judge of the Circuit Court, held at the Richard E. Gerstein Building, 1351 N.W. 12th Street, Miami, Florida, heard on October 24, 1996, at or about 2:00 p.m.

[p. 2] APPEARANCES:

KATHERINE RUNDLE
STATE ATTORNEY
BY: ANITA GAY AND
REID RUBIN
ASSISTANT STATE ATTORNEYS
1320 Northwest 12th Avenue
Miami, Florida 33136
On behalf of the State of Florida.

FOLEY & LARDNER
ATTORNEYS AT LAW

BY: MICHAEL A. BOWEN
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
On behalf of the Defendant.

ALSO PRESENT: VIVIAN MOURIN
INTERPRETER

[p. 3] (Thereupon, the following proceedings were had.)

THE COURT: Do you have any of the pleadings?

I need everybody to announce themselves for the record.

MS. GAY: Anita Gay on behalf of the State. I have my copy of the letter.

MR. BOWEN: Michael Bowen of the law firm of Foley & Lardner on behalf of the defendant.

MS. GAY: Just before you came out, the defendant said through the interpreter that he wished to speak to the representatives of the State. I asked that he wait until Your Honor is present.

THE COURT: Mr. Sanchez-Velasco, it is my understanding that you want to address either the Court or the State. Is that correct?

THE DEFENDANT: Uh-huh.

THE COURT: What is it that you wish to say, sir?

THE DEFENDANT: I would like to say to Your Honor to have an attorney like that one, it's like my Rights are being violated.

THE COURT: It is my understanding that you are dissatisfied with Mr. Bowen. Is that right?

[p. 4] THE DEFENDANT: He never has been my attorney.

THE COURT: I need you to speak Spanish.

THE DEFENDANT: He has never informed me anything about my case. He's been my attorney for four years. He only went to see me once. Never has he ever told me what he wants to do with my case, nor has he ever asked me anything about my case. He's never informed me anything about the case.

THE COURT: Okay. Mr. Bowen, it's my understanding that you were co-counsel with Ms. Jacobs –

MR. BOWEN: And Ms. Greenberg. That is correct. It is also correct after my initial interview with Mr. Sanchez-Velasco, the contact between the defense team and Mr. Sanchez-Velasco were handled through Ms. Jacobs and Ms. Greenberg. He is correct, that I had not spoken to him since that initial interview.

THE COURT: What was the date that they were allowed to withdraw from the case; if you remember?

MR. BOWEN: I don't remember the exact date, Your Honor. But my recollection it was [p. 5] approximately a month ago.

THE COURT: Have you had any contact with the defendant during that time?

MR. BOWEN: I've had no contact with the defendant other than to send him a copy of the letter, understanding that he conveyed to me through a relative, a request –

THE DEFENDANT: He's never sent me a copy of anything. The only letter that I received was from the Court, signed by Your Honor, telling me that the attorneys, Jennifer Greenberg –

THE COURT: Ms. Jacobs?

THE DEFENDANT: Yes. You had granted the motion.

THE COURT: They had asked to withdraw. Do you know that?

THE DEFENDANT: Yes.

THE COURT: Okay. Mr. Bowen, I need you, for the record, to tell me what in fact you have done on Mr. Sanchez-Velasco's case.

MR. BOWEN: I have participated in drafting the petition for Post Conviction Relief. I did interview Mr. Sanchez-Velasco at the beginning of my involvement in the case in the company of an attorney with the Volunteer Lawyers Resource [p. 6] Center.

In that interview and my consultations with those attorneys, I reviewed and participated in drafting the petition for Post Conviction Relief.

I have appeared several times in court and several more times by telephone in connection with conferences related to the case both of an involuntary nature and scheduled nature.

I, also, prepared the brief for the Court on the question of waiver of privilege with respect to the camera discussion with trial defense counsel. I have, pursuant to the Court's direction, transmitted to the State trial counsel's files that were in my possession. I participated in the hearing held at the time Mr. Sanchez-Velasco asked to have his petition dropped before Judge Glick. I participated in that and took a position with respect to that, which was ultimately sustained by the Court, or it was consistent at least with the Court's ruling.

And I believe in broad summary, Your Honor, aside from doing that and contacting various persons who are potential witnesses for the [p. 7] evidentiary hearing scheduled for the 10th and 11th, and arranging with an associate who works with me, an associate who worked with me as a doctor of medicine, provided to assist me with that hearing. I think that pretty well summarizes my position in the case.

THE COURT: Have you handled other Rule Three Motions in other death penalties?

MR. BOWEN: No. This is the first death penalty.

THE COURT: Have you discussed this case or procedure of handling the Rule Three with other attorneys?

MR. BOWEN: I have discussed to some extent with Ms. Greenberg and Ms. Jacobs prior to their withdrawal, the basic procedures for this type of proceeding.

THE COURT: Are you aware of the pertinent case law that provides support to these cases?

MR. BOWEN: I am generally aware of it. I do not have an in-depth command of that case law. I believe I am generally familiar with it.

THE COURT: Do You believe that your general knowledge is sufficient enough for you to be able to handle this case?

[p. 8] MR. BOWEN: Yes, Your Honor, I do. I think that my assessment is based on my belief that, at this point, the critical issues in the case are factual and controversial, rather than legal.

I guess I would qualify that assessment by saying my assessment of my ability to – or the sufficiency of my command of the legal principles is necessarily colored by my familiarity with it. So the extent of my assessment would be mistaken, but based on what I have seen in this case so far, I do feel I can provide competent counsel to Mr. Sanchez-Velasco.

THE COURT: Mr. Sanchez-Velasco, were you aware that Mr. Bowen was acting as co-counsel with the other attorneys, and the other attorneys were, in fact, acting as the liaison with you?

In other words, they were the ones who were chosen to have the personal contact during the period of time they were acting as your attorneys.

MS. GAY: Your Honor, I do not know that the defendant was ever placed under oath before he began giving statements.

THE COURT: Can you raise your right hand [p. 9] and be sworn?

(Thereupon, the defendant was duly sworn.)

THE COURT: Do you need me to repeat the question?

THE DEFENDANT: No, I heard you. First of all, Your Honor, my opinion is as the State should know and as you well know as the Judge that you are, that Mr. Bowen, he is an attorney and he practices civil law. He has never practiced criminal law, specially, in a case like this which is a capital case, which is life or death.

So it's the Court's obligation to make sure that an attorney doesn't lie as far as saying he's competent in a state where he's not even licensed to practice in the State of Florida. An attorney that has never studied or never done criminal law.

He has never informed me about anything like that. This man never told me that he practiced civil law, that he was from another state where the capital punishment does not exist. And he has never talked to me, said anything to me about my case. None of the witnesses in my case, none of them know who this man is. None of my [p. 10] relatives know who he is. He hasn't done anything on my case like he says.

An organization paid by the Federal Government, called V.R.C., was representing me through politics or Congress, but that organization was closed. And it's the Court's obligation, and that man's obligation as an attorney, to have informed Your Honor that he's not a criminal attorney, that he doesn't have a license to practice, and

that he has never had experience in capital cases, and that he has never worked directly on my case.

And therefore, as an attorney, even if he is an attorney that practices civil law, he should know that it's against the law, against the Florida Bar Association to violate all my Rights. That the rules of the Florida Bar provide to maintain the client informed. But the whole process to keep the client informed about any motion or appeal or anything that's going on in your case, and that man has violated those Rights.

I don't think he's competent. I don't think he's a good attorney or a competent attorney. The State where he's from, where he practices [p. 11] civil law, there is no capital punishment. How could he ever work on a capital case? And how is that that an attorney outside this state voluntarily for free would take a death penalty case without having the ability to from [sic] the knowledge, you know, to represent the case?

THE COURT: Okay. Anything else?

THE DEFENDANT: No. So to avoid all those problems right now, I want him to withdraw from my case and I want Your Honor to accept to give me my Rights, to waive my 3.850 Appeal.

THE COURT: Do you want to withdraw your appeal?

THE DEFENDANT: Yes. I've – I want to waive my Right.

THE COURT: Well, I would like, if we could, to discuss one issue at a time. There are two points now that you are raising. One, is the question of whether Mr.

Bowen is competent to represent you; and the other is the question of whether or not you want to withdraw your Rule Three, 3.850.

I would first like to determine the issues of your attorney. These are the things that I've heard you comment on and I want you to tell me [p. 12] whether I have them all.

Number one, he practices civil law outside of the State of Florida. That he is not licenced [sic] to practice in the State of Florida, and you feel he is not competent to handle the case.

Number two, he has never had no direct contact with you.

THE DEFENDANT: That's correct.

THE COURT: Number three, that he has not informed you of the things that have been going on in the case.

THE DEFENDANT: For the last four years, no.

THE COURT: Number four, he does not know you or your family or any of your potential witnesses that would be called.

THE DEFENDANT: Right.

THE COURT: Is there anything other than that? I just want to make sure I have everything before I ask Mr. Bowen.

THE DEFENDANT: That is correct. The point I'm trying to make, he's not my attorney. He's never been

my attorney. And I ask Your Honor to tell him to withdraw on the case because he is incompetent, and I believe there is either a conflict or a personal interest in order for him [p. 13] to come from another state and work here in Florida for free. He is not competent counsel.

THE COURT: You are questioning whether or not he has some kind of conflict, and I am not sure what it is you mean by that.

THE DEFENDANT: I don't know where he's from, where he's coming from. I've never heard that a person would offer to work for free. And that he pretends to be working without really be working.

THE COURT: Okay. Anything else?

THE DEFENDANT: No. I just want to put it on the record that he is not my attorney, and I want him to withdraw from the case. For Your Honor to ask him to withdraw from the case. He is probably going to tell Your Honor that I'm not competent, that I'm incompetent because I'm saying, you know, that he's not competent to handle the case. The State of Florida has evaluated me and I'm 100 percent competent.

THE COURT: Okay. Anything else?

THE DEFENDANT: No.

THE COURT: Okay. Mr. Bowen, if you could address each of the issues. I guess what I will do is outline them for you. First thing, you [p. 14] have never worked directly on the case. You have touched on that briefly, but if you can tell me further what you did.

MR. BOWEN: I directly participated in drafting the petition before the Court. The initial draft was prepared by Ms. Greenberg and Ms. Jacobs. I extensively made – although the time was short, I made comments and suggested the changes, of my recollection, that involved three or four typed pages. With respect to that, I also inferred extensively the tactical choices that are entailed by the petition and by what we all thought the stronger and weaker points were.

I have, in fact, been in court on more than one occasion connected with this case to address substantive issues. I have also addressed substantive issues in telephonic conferences. For example, at one point the State had requested that the Court require disclosure or tender of the trial counsel's files in my possession. I, at that point, organized before Judge Glick, that that was premature until the State has filed its response to the Rule Three Motion. That position was sustained by the Court. That's an example of the types of things that I have done.

[p. 15] It is also correct as Mr. Sanchez-Velasco perhaps anticipated on a previous occasion he wrote a letter which came to the attention of Judge Glick asking for the withdraw [sic] of this petition, and I appeared in court with Ms. Greenberg and Ms. Jacobs and argued that he was not mentally competent to make a decision and it should not be honored, and Judge Glick conducted the colloquy and ultimately the petition was not withdrawn.

I will qualify all of that by saying the principle role in the case up to now that I have had a relatively secondary role in the case, partly because of the greater experience of Ms. Greenberg and Ms. Jacobs. Because of their greater

proximity, to the extent the comment is made that I have not been lead counsel in the case is, in fact, up to this point, that would be correct. The fact that I have not worked in the case, that is incorrect.

THE COURT: I have already addressed the issue of informing Mr. Sanchez-Velasco, but it's my understanding that Ms. Jacobs or Ms. Greenberg took that role up until they withdrew.

MR. BOWEN: Yes.

[p. 16] THE COURT: How about the fact that you are not licensed to practice law in the State of Florida.

MR. BOWEN: That is correct. I was admitted by the Court pro bono on this matter, as I have been in many courts where I practice.

THE COURT: So you are, in fact, permitted to practice law with this particular case because you have asked permission?

MR. BOWEN: That is correct.

THE COURT: How about the fact that Mr. Sanchez-Velasco's allegations are that you do not know any of his family or witnesses that would be needed for the Rule Three?

MR. BOWEN: I am not personally acquainted with his family or witnesses. I have spoken to two potential witnesses for the evidentiary hearing that's scheduled. And my anticipated contact with the other members I felt it necessary to suspend then [sic] when I received

word that Mr. Sanchez-Velasco wished to remove me from the case.

But it is correct, that I have not had personal contact with his family members.

THE COURT: Okay. Do you only practice [p. 17] civil law?

MR. BOWEN: For all practical purposes, the answer is yes. In twenty years of practicing law, I have handled two criminal cases. One resulting in a plea before trial, and one resulting in a one week trial in which I was assisted by a public defender and eventually lead in an appeal. That was a very full experience.

But those two cases are the only criminal experiences I've had in twenty years, and, otherwise, have been revised to civil litigation.

THE COURT: So you do civil litigation?

MR. BOWEN: Yes, Your Honor.

THE COURT: So you are well aware of courtroom procedure and laws that apply to it?

MR. BOWEN: I feel very comfortable in cross examining witnesses and courtroom procedure.

THE COURT: The last thing was the question of the conflict. Perhaps you can explain. The Court really does not need an explanation, but it might help.

Why is it that you have offered to take this case for free and come to the State of Florida? Is there some sinister motive?

MR. BOWEN: There is not. It is my personal [p. 18] opposition to the death penalty. And the fact of the statement that was made by the A.B.A., Death Penalty Project, that approximately 40 percent of cases that are taken by lawyers resulted in Discovery of some error resulting in setting aside of the death penalty.

As a member of the Bar, it's rather shocking that there is that kind of statistical occurrence. I call it a professional obligation to volunteer.

THE COURT: Okay. The Court finds no reasonable cause to believe that Mr. Bowen is rendering ineffective counsel to Mr. Sanchez-Velasco.

You have two choices. The Court is not going to appoint another attorney to represent you. You can represent yourself, if you choose to. I don't think that's a good idea in light of the penalty you are facing. Or you can go forward with Mr. Bowen.

Before you answer that question, I would like you to take a few minutes and talk to Mr. Bowen in the jury room. I think a lot of this might be personal conflicts that you are having with him.

[p. 19] Ms. Jacobs said that you were, in fact, very comfortable with Ms. Jacobs and Ms. Greenberg, and that you did, in fact, not have a personal relationship with Mr. Bowen. I am not going to appoint you another attorney. I do not want you to move hastily and decide that you want him to be discharged from the case and that you are going to represent yourself and do something in the end that you are not going to be happy with.

So if you want to take a few minutes, I will allow Mr. Bowen to go into jury room with you to talk with him through the interpreter.

We can arrange it so you can talk with Mr. Bowen without having to go into the jury room. Do you want to do that? Except for, of course, the correction officers.

THE DEFENDANT: I appreciate Your Honor's intentions, but the reason that I'm here right now is because I don't need an attorney. I don't want him, nor do I want any other attorney, nor have I asked the Court for any other attorney. I'm capable – I was evaluated by the Court, by criminal court, I'm competent. A couple of months ago I was evaluated by Brevard County.

MS. GAY: He was evaluated by Doctor Greer.

[p. 20] THE DEFENDANT: The doctors, they testified in court that I was competent to the motion that I was filing. It was a similar case to get rid of the attorney.

THE COURT: How long ago was that?

MS. GAY: The report I have received from the prosecutor was last October, October 1995. It was Doctor Greer's evaluation when the defense experts evaluated him.

THE COURT: Did Judge Glick find him not competent?

MS. GAY: He has two pending first degree murder cases up in Brevard county. There were two prior hearings that he attended. Once before Judge Wilson where he was writing letters to the Governor stating he wanted to be executed, and the hearing came before

Judge Wilson. And after the termination of those hearings, the request was withdrawn and Judge Wilson recused himself which sent the matter in front of Judge Glick. And shortly after that, the defendant wrote letters asking to be executed.

Mr. Bowen came down from Milwaukee for that hearing. And before the evaluation hearing was made, he withdrew that request. So it's [p. 21] certainly the State's position that what he is doing today is another attempt to delay the proceedings.

Your Honor has set an evidentiary hearing. We're just shortly one month away from that hearing. And now he is attempting to delay this because as long as the Rule Three is pending, his status on death row does not change other than being a resident.

THE COURT: He appears very intelligent to me, at this point. He appears to be very competent. If he wants to discharge his attorney and withdraw his Rule Three –

THE DEFENDANT: I have a right to by law.

THE COURT: I believe he has a right to. The question is whether or not there is any question that he is not competent. I would assume, in light of the fact that Mr. Bowen wants to make sure that you do not go to the electric chair, I would only be comfortable to having you evaluated. And if you want me to do that, I will do that. They will do it on an emergency basis.

THE DEFENDANT: I appreciate it. I just don't want to waste your time. I want - I want to save you time. Talking to that man is not [p. 22] going to solve

anything. I don't want him anymore. I don't want him to come near me.

THE COURT: No. No. Listen for just a second. It is not a question of asking you to talk with him anymore. I'm willing to accept the fact that you want to discharge him and that you want to withdraw your Rule Three. I just need for you to understand the consequences of that action. I want to make sure that you understand what you are doing, and in order for me to make sure, I am not a doctor, I am going to have you evaluated. I am going to have a quick evaluation done. If they say you are competent, I will allow him to withdraw, allow you to withdraw your Rule Three.

THE DEFENDANT: For the last ten years I've been evaluated by the State of Florida, and correction department has hundreds of psychologist and psychiatrist, and I'm being watched 24 hours a day, and they have my file and they say I'm 100 percent that I'm mentally competent. I'm fine. If you have any doubt about my competency, you can ask me whatever question you want. Or if that don't satisfy the law, then you have every right to ask for an [p. 23] emergency for psychiatrist to ask me the question in front of Your Honor, if you want, and then for you to legalize my Right to waive my appeal. And then you can report it to the Governor that I no longer have a pending appeal.

MS. GAY: Your Honor, before we get to the position of this competency, can we have a Faretta Inquiry to whether or not he is capable of representing himself and discharging his attorney?

THE COURT: Do you want me, before I have the evaluation done, to determine whether or not he is even competent to be making that request?

If I have the evaluation done and he comes back as not competent, then it wouldn't be his choice to discharge his attorney.

MS. GAY: Correct. But if he is competent, then you are still going to have to go through the Faretta Inquiry. Because Nelson versus State, that case states that a defendant is not entitled to appointed counsel of choice, and if he is not competent to represent himself, then he cannot discharge the attorney absent of finding a conflict by Your Honor.

So unless you have found that the reasons he [p. 24] articulated have established that Mr. Bowen is rendering deficient assistance, then we do not need it. And if you then find that he is not able to represent himself, we do not move to go any further unless Mr. Bowen is moving to withdraw.

THE DEFENDANT: I don't understand. You as a Judge, you have through your knowledge, you have the power, you have the right to decide to ask questions that can convince for the state attorney to conclude what's going on here in front of all the people here who are present, you can classify me as competent without the need to going through all the process. And you already have my file, the file for ten years, all the evaluations that they have done for the past ten years. The attorneys are saying that I'm not competent. They just want to throw money away. It's just an unnecessary expense. They want to justify something. They know that I'm normal. You

have the power as a Judge to decide right now and to accept my verbal motion, my Rights to withdraw my appeal.

THE COURT: Okay.

THE DEFENDANT: And for the attorney to [p. 25] withdraw. Because I no longer need an attorney because I don't want an appeal.

THE COURT: This is the problem I have and I'm looking to the state and to defense for a little bit of direction. Okay. Obviously, if I conduct a Faretta Inquiry to determine he has the ability to represent himself in a Rule Three, I doubt that his legal experience and educational training and everything else is going to rise to the level of being able to do that.

The question then becomes, do I conduct a Faretta Inquiry if he's able to withdraw his appeal?

MS. GAY: I didn't bring the case law because this was not an issue today. Under the case of Durocher and State, Mr. Durocher was on death row and volunteered to be executed, and they set forth a proceeding or outline for the court in the future that eventually a competency evaluation must be conducted. If there is any question at all, then that should be regarded first.

Even if he keeps Mr. Bowen on the case, he can still direct Mr. Bowen to waive the Post Conviction matter, and Mr. Bowen can provide [p. 26] assistance with the Durocher hearing and having the competency hearing conducted.

MR. BOWEN: I am quite troubled by the inconsistencies between the position that Mr. Sanchez-Velasco

has taken at the beginning of the colloquy. He expressed concerns about my ability to represent him in a matter in which the stakes are as high as they are with the implication that I was not as good as someone who faced that risk deserved and had a right to expect. And then at the end, his objection is to withdraw altogether, which would make irrelevant my capacity.

What troubles me about that is that suggestions are made that lurking behind the superficial coherence of Mr. Sanchez-Velasco's demeanor and his articulated ration is a basic confusion which suggests to me a basic lack of mental ability to make a very grave decision he's making.

It seems logical to me, Your Honor, that nothing further can be done until the Court has taken whatever steps the Court has taken to satisfy itself that Mr. Sanchez-Velasco is or is not competent to make decisions either to with [p. 27] withdrawing his appeal or proceeding on his own.

I do not see how any inquiry prior to that can be particularly useful. If we had an inquiry right now and we had a competency determination that determined he was incompetent, we would have wasted the Court's time.

THE COURT: I tend to agree with you on that. This is what I'm going to do. Are you going to be here on Monday, Mr. Bowen?

MR. BOWEN: I was not planning on it, Your Honor. I am at the Court's pleasure.

THE COURT: Are you going to be here tomorrow?

MR. BOWEN: My plans are to fly back tomorrow. If necessary, I will attempt to –

THE COURT: Ms. Gay, do you know whether they can do an emergency evaluation by tomorrow?

MS. GAY: It depends on the availability of the doctors.

THE DEFENDANT: The corrections department have of plenty doctors.

THE COURT: I understand that there is plenty doctors there.

THE DEFENDANT: Licensed to practice medicine.

[p. 28] THE COURT: I am going to order an emergency evaluation by JMH, a full screening concerning competency depending. I am ordering it back for tomorrow, so we'll resume tomorrow at two.

You are going to have to stick around.

MR. BOWEN: I'll find a way to do it.

THE COURT: I need Mr. Sanchez-Velasco brought back at 2:00. I'm going to order the report by then. Assuming that comes back competent, then I am going to go forward with addressing your other issues.

MS. GAY: If you find that they are unable to do it tomorrow by two, I have no objection to contacting Mr. Bowen tonight.

THE COURT: I prefer to get it done this week, though.

THE DEFENDANT: I would like to ask something. I suggest to Your Honor as the – you represent the law, that man is my enemy. I don't want that man two feet away from me. I consider that man my enemy. I ask Your Honor to order him to stay away from me before a misfortune could take place. I don't want an enemy of mine that I consider in my heart an enemy, I don't want him to come near me or approach me. I want a [p. 29] restraining order until I'm evaluated. And then if they find me incompetent, you can say whatever you want. And if I'm competent, then he can go home.

But I don't want him near me. If necessary, I'll speak – I'll have an order to the Governor so they keep him away from me or the corrections. I'm under the Government's protection. I don't want him near me.

THE COURT: Wait. Let me talk. I understand exactly what you are saying. Mr. Bowen has no reason to speak to you between now and tomorrow. I certainly hope that you are not in the presence of the Court threatening in any way Mr. Bowen.

THE DEFENDANT: No. No. No. That's not my intention.

THE COURT: The doctor will evaluate you tonight or tomorrow and you will be back in front of me tomorrow at 2:00.

THE DEFENDANT: I appreciate that. Thank you very much for your time.

MR. BOWEN: I do ask that the physician who evaluates Mr. Sanchez-Velasco be apprised, be provided with a summary of what [p. 30] Mr. Sanchez-Velasco's has

made in this hearing, including the last colloquy because I think that's highly relevant. It is highly relevant.

THE COURT: I'm wondering. I wonder if we can have the doctor here. It may be that the doctor contacts you, Mr. Bowen.

MR. BOWEN: Fine.

THE COURT: Maybe we can put on the order a number that you can be reached at by the doctor in order to discuss the issues, as well as Ms. Gay's number in case he needs perspective on the case. So tomorrow at 2:00.

Court is in recess until tomorrow. (Thereupon, the hearing was concluded.)

[p. 31] CERTIFICATE

STATE OF FLORIDA (
(ss.
COUNTY OF DATE (

I, MICHELLE R. VENDITTI, Court Reporter and Notary Public in and for the State of Florida at Large, do hereby certify that the foregoing proceedings had in the cause of STATE OF FLORIDA versus RIGOBERTO SANCHEZ-VELASCO, Case Number F86-37102, heard before the Honorable VICTORIA PLATZER, is a true and correct transcript held at the time and place stated herein.

I WITNESS MY HAND, and affix my official seal this 4th day of November, 1996.

/s/ Michelle R. Venditti
MICHELLE R. VENDITTI
Reporter

[SEAL] OFFICIAL NOTARY SEAL
MICHELLE R. VENDITTI
COMMISSION NUMBER
CC319669
MY COMMISSION EXP.
SEPT 28, 1997

[p. 32] IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT, IN
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

Case No. F86-37102

(JUDGE PLATZER)

STATE OF FLORIDA)
Plaintiff,)
vs.)
RIGOBERTO SANCHEZ-VELASCO,)
Defendant.)

Transcript of Proceedings had and taken before the Honorable VICTORIA PLATZER, as Judge of the Circuit Court, held at the Richard E. Gerstein Building, 1351 N.W. 12th Street, Miami, Florida, heard on October 25, 1996, at or about 2:00 p.m.

[p. 33] APPEARANCES:

KATHERINE RUNDLE
STATE ATTORNEY
BY: ANITA GAY AND
REID RUBIN
ASSISTANT STATE ATTORNEYS
1320 Northwest 12th Avenue
Miami, Florida 33136
On behalf of the State of Florida.

FOLEY & LARDNER
ATTORNEYS AT LAW
BY: MICHAEL A. BOWEN
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
On behalf of the Defendant.

ALSO PRESENT: BERTA CARRAL
INTERPRETER

[p. 34] (Thereupon, the following proceedings were had.)

THE COURT: We are here on Rigoberto Sanchez-Velasco. I assume everybody has had an opportunity to see the report from Doctor Ruiz.

Is that her name?

MS. GAY: Yes.

THE COURT: Doctor Ruiz did find that Mr. Sanchez-Velasco is, in fact, competent to proceed. So based upon the discusses we had yesterday, there are some other questions that I would like to ask of you.

What I am going to do now is, in light of the fact that Doctor Ruiz had found you competent and wrote a rather lengthy report, which is what I found as well, you appear to be relatively intelligent, you understand what is going on, I need to determine whether or not you want to represent yourself and whether or not you are competent to represent yourself.

So if you would raise your right hand and be sworn by the clerk.

(Thereupon, the defendant was duly sworn.)

THE COURT: Okay. Tell me what your full name is.

THE DEFENDANT: Rigoberto Sanchez-Velasco.

[p. 35] THE COURT: Do you want me to call you Mr. Sanchez-Velasco or what name –

THE DEFENDANT: At your convenience.

THE COURT: Okay. How old are you?

THE DEFENDANT: Thirty-seven.

THE COURT: How much education have you had? How much formal education?

THE DEFENDANT: Seventeen.

THE COURT: Seventeen years of education? Where was that education?

THE DEFENDANT: In Cuba.

THE COURT: So seventeen years means you graduated from high school and went to post high school?

THE DEFENDANT: Pre-university.

THE COURT: Did you study anything in particular?

THE DEFENDANT: I never got to the university.

THE COURT: How many years is high school over in Cuba? I don't know.

THE DEFENDANT: Six primary or elementary, six in secondary schools, four pre-university, and four

university. And afterwards, four years, whatever career you choose.

[p. 36] THE COURT: Okay. Did you work when you were in Cuba?

THE DEFENDANT: Uh-huh.

THE COURT: I need you to say yes or no.

THE DEFENDANT: Yes.

THE COURT: What kind of jobs did you have?

THE DEFENDANT: I was designing cars and assembling them. I was making them.

THE COURT: How long did you do that for?

THE DEFENDANT: Two years and something.

THE COURT: Okay. At the time at which you came to the United States, were you employed over here?

THE DEFENDANT: Uh-huh. Yes.

THE COURT: What did you do over here?

THE DEFENDANT: I worked for a relative of mine.

THE COURT: What did you do?

THE DEFENDANT: In construction. Making homes.

THE COURT: Okay. Did you ever have any formal education or formal training or any kind of training at all over here?

THE DEFENDANT: No.

THE COURT: Okay. Now, do you understand [p. 37] the type of motion that has been filed by the attorneys in this case?

THE DEFENDANT: Which motion are you referring to?

THE COURT: The Rule Three. Do you understand what the Rule Three is?

THE DEFENDANT: They have not taught me or given me any copies of this motion as such.

THE COURT: Do you understand what the affect would be if I were to grant the Rule Three; if I were to rule in your favor in regard to the Rule Three?

THE DEFENDANT: Are you speaking of me, denying my Rights to 3.850 Motion?

THE COURT: Right. I am asking you if you understand what the affect would be if I granted your motion?

THE DEFENDANT: Naturally.

THE COURT: Okay. Why don't you tell me what it means?

THE DEFENDANT: That I would be free in the hands of the Governor.

THE COURT: I'm not sure what you mean "free in the hands of the Governor."

THE DEFENDANT: Upon finishing the judicial [p. 38] process, I am free for the Governor to comply with his duty and his obligation to carry out my conviction.

THE COURT: Okay. Do you understand that your attorneys, your prior attorneys and your present attorney, Mr. Bowen, filed a motion that said that certain things which took place at the trial at both the guilt phase and penalty phase were improper, and that up until this point I have denied part of those and I have ordered an evidentiary hearing as to two of those claims? If this matter continues on to an evidentiary hearing – and I believe the two issues had to do with only the penalty phase?

MS. GAY: Yes.

THE COURT: If it continues on to an evidentiary hearing, and if I rule in your favor, then in all likelihood we would have a new sentencing phase, which means we would bring in a new jury, and the issue of the penalty in this case, meaning whether you get life in prison or whether you get the death penalty, would be given to the jury for recommendation and for me to make a final ruling.

Do you understand that is the affect of the [p. 39] motion that is now pending before the Court?

THE DEFENDANT: Uh-huh.

THE COURT: Yes? I need a yes or no.

THE DEFENDANT: Yes.

THE COURT: Okay. It is my understanding that you want to withdraw that motion?

THE DEFENDANT: Uh-huh. Correct.

THE COURT: Okay. Do you understand that the affect of withdrawing that motion would be that you

would no longer, in all likelihood, have any Right to file for any kind of Federal relief, that the matter would not go to the Supreme Court of Florida for appeal, and that in all likelihood you would then be back – you would go back to Stark, or whatever it is you have to go for your other trial, but as to this case, your appeals would be, in essence, over? Do you understand that?

THE DEFENDANT: Uh-huh. Yes.

THE COURT: Okay. Now, is that what you want to do?

THE DEFENDANT: I don't have any other road.

THE COURT: Well, you do have another road. You actually have two other roads. One, is that you can represent yourself in the motion for Post [p. 40] Conviction Relief, which means in the Rule Three you can represent yourself, as my personal belief, you would be making a huge mistake in doing that because I do not believe you have the ability to do that; or, you could continue to have Mr. Bowen represent you, and that, of course, is what we are here today to determine.

THE DEFENDANT: As I explained to you yesterday, I have never had that man as an attorney. And by law, he is illegally representing me and has violated all my Rights.

And you, yesterday, clearly denied and specifically specified that you would not give me the Right to have an attorney – competent attorney to represent me, and given me this man who has not represented me adequately, and who is my enemy to represent me in this court.

I don't believe in the justice of this Country, and it's not offensive to you or anyone. But I would like for them to have the opportunity to play their game completely. And in that fashion, well, I have the Right to die in peace.

THE COURT: Okay. Ms. Gay, is there anything further that I need to ask the [p. 41] defendant?

MS. GAY: We would just ask that you make sure that he understands that if he does withdraw the current motion, that if he withdraws the current motion, that he would not be able to file another motion should he change his mind next week or next month or next year or any time in the future.

THE COURT: Do you understand that?

THE DEFENDANT: That motion was set four years ago, and I've never known as far as what happened to that motion. And four years, I believe, that was pending in this Court, and I've never known if that motion was – what was the answer to that motion; has it been granted or denied. I have never been informed of that motion. I had forgotten about that motion. I don't know what that motion is about now.

THE COURT: Well, Ms. Gay is referring to the motion that is now pending before the Court, that I just explained to you a few moments ago, that you are saying you wanted to withdraw that motion for Post Conviction Relief, which is 3.850. Ms. Gay wanted me to ask you, and I want to know if, in fact, you want to withdraw that [p. 42] motion?

The time has now passed for you to file another motion should you change your mind, and, in affect, you

will be giving up all your motions to file any other kind of appeal, whether it be in the state court or in the federal court, and you will be sent back to death row. And I want to make sure that you understand that.

THE DEFENDANT: I understand it perfectly. And as she told me, it's my desire. And I don't have any other – like you said, I'm not competent to represent myself. And that's what you are asking me to do; to represent myself.

I have not gone to the school in the United States. I do not know the laws of the United States. And I very barely understand the language. And if I'm not going to be represented by someone, and I cannot represent myself, why am I going to waste my time?

THE COURT: Anything else?

MS. GAY: Does he understand that Mr. Bowen was working with the two attorneys who were local, Ms. Greenberg and Ms. Jacobs, who were in Tallahassee until 30 days ago, and Mr. Bowen was working with those two attorneys who would come [p. 43] and visit him, and now Mr. Bowen being in Milwaukee has not been able in the last 30 days to visit him, but could make arrangements to meet with him and to resolve some of the differences that he stated yesterday that he has with Mr. Bowen, that we could proceed to the evidentiary hearing in December and have Your Honor make a ruling on his 3.850? Or is he saying he wants to withdraw the 3.850 motion?

THE DEFENDANT: In a letter from the Court signed by you, you said that I did not have anymore

Jenny Greenberg or Jacobs, they had withdrawn – they withdraw from the case.

THE COURT: That is correct. They had to withdraw because the agency that they worked for went out of business and they were going to work somewhere else.

THE DEFENDANT: I understand that.

THE COURT: I want to make sure you understand that the entire time they were coming to see you, that in the background was Mr. Bowen who was working on the legal issues and who was in touch with Ms. Greenberg and Ms. Jacobs working on your case, but because he lived out of town and they lived in town close to you, they [p. 44] acted as the liaison with you. And that, at this point, there has been a ruling by me on the motion, such that I have granted you an evidentiary hearing as to two of the issues.

Okay. And that is what –

THE DEFENDANT: First time I find out about this. This proves to you that justice that I have not had, I have not been represented legally, or the attorney has not done his job. Because if it's not her duty to confront me about my case, that's the job of my attorney, too, and my attorney has not done that. That means I have not had an attorney.

So please, I understand everything, the consequences. I am – I refuse or waive my Rights, and that motion, and just leave me in the hands of the Governor.

THE COURT: Mr. Bowen, do you want to address the Court?

MR. BOWEN: Yes, Your Honor. I ask that Mr. Sanchez-Velasco be asked if he can have an attorney that he would be satisfied with, someone other with [sic] me, would he then wish to proceed with the 3.850 Motion?

THE COURT: I do not want to pose a [p. 45] hypothetical that has no basis in fact.

MR. BOWEN: It's certainly not impossible that he could be provided with an attorney he would be satisfied with in arrangement. I'm extremely troubled by the indication that he does not appreciate fully what is stated in the motion or the nature of the motion or the fact that at the evidentiary hearing, the relief that could be granted to him. He is motivated solely by his dissatisfaction in seeking to drop a motion that otherwise, could grant him relief.

MR. RUBIN: What I am wondering is whether the defendant fully appreciates the sequence of events in this particular case?

He had a team of three attorneys for an extended period of time, and their relationship were such, as two of them were in such proximity, that's not to say that Mr. Bowen was always working on the case.

It's only very recently that Mr. Bowen became the sole attorney on the case. It's only very recently that some communication was delivered to Mr. Bowen to the affect that the defendant was unsatisfied with having Mr. Bowen as his sole attorney. The defendant is unhappy [p. 46] with the fact that Mr. Bowen has not seen him in the interim, but it's a short span of time.

The defendant is unhappy with the fact that Mr. Bowen may not be personally familiar with all of his witnesses, and nothing has been done by Mr. Bowen since the complaint was lodged by the defendant in regard to meeting with these witnesses. If more time, some more time were provided for Mr. Bowen to familiarize himself fully with the witnesses – I'm sure Your Honor has discerned by now he is a fully competent attorney, an attorney who is competent well enough to understand if he were to need help in the appreciation of the charges, that he would seek that help, and to that extent he has already sought the assistance of someone in his firm, a physician who happens to be an attorney who practices in the firm.

I think that we all trust that if Mr. Bowen felt, in his professional opinion, that he was incapable of handling this procedure, he would say so. If he required the assistance of another attorney, he would say so. If he needs more time to prepare himself with regard to his expert witnesses to familiarize himself with the [p. 47] defendant's witnesses, we would agree to give him another 30 days, if that's sufficient.

The defendant can't pick and choose his attorney. A very fine attorney has been offered to represent him, and there is no reason why he should not be able to do that. That is the attorney representing him.

The defendant is concerned and has expressed some concern and disbelieve [sic] about the fact that Mr. Bowen would be willing to represent him for free and how could that happen. He may not appreciate that in our system of justice, there are a great many of attorneys throughout our Country who do pro bono work, and they do a lot of

death penalty pro bono work. He is one of those attorneys who offers his time to do that on behalf of his firm. He's dedicated to doing this. He has demonstrated to this Court he's more than capable of handling the proceeding.

Now, I think that perhaps this should be further discussed with the defendant so that he's not left in a posture where he says, well, this attorney is not competent to handle the proceeding – which is not true. I'm not competent to handle the proceeding – which is [p. 48] probably true. And, therefore, I have no choice but to withdraw my appeals, which in the end could be his free and voluntary choice to end his appeals. But it's not going to be – and the record should not reflect that it's going to be because he does not have available to him a competent attorney to represent him wholly and have sufficient time to prepare and present his case.

THE COURT: Mr. Bowen, do you want more time to prepare; assuming you want to?

MR. BOWEN: I do not feel I need more time to prepare the case. My concern, Mr. Sanchez-Velasco has said, I don't know what that motion is about. He said – when the Court explained it to him, it was the first time he learned it was to be an evidentiary hearing on the merit of two of the challenges to be made with potential consequences to his death penalty to be vacated.

The inference that I am drawing from what Mr. Sanchez-Velasco said this afternoon is that he is asking to withdraw the Rule Three Motion that has been filed on his behalf without fully appreciating what it is or being fully informed [p. 49] about its status simply because he

is dissatisfied with the prospect of having me represent him in connection with that.

If that is the case, but for my involvement as his attorney, but for that he would not wish to withdraw the motion, then I do not think the motion should – I don't think he should be allowed to withdraw it. I think that is a fundamentally irrational decision.

MS. GAY: Your Honor, if that is the basis, the sole basis for the withdrawing, then the motion should not be withdrawn. However, if he does wish to voluntarily withdraw the motion, then a Faretta Inquiry would be conducted.

Since Your Honor has not been the only judge on this case, I just want to bring to your attention the State's position. This defendant in March of 1994 and April 1994, wrote two letters to the Governor saying he wanted his death warrant signed. We brought the defendant down here, and after he was interviewed – I think at that time this was Judge Wilson initially, and then about six or eight months later he did the same thing again with Judge Glick, and both times it was merely an effort by [p. 50] the defendant to build a delay into the recitation of his Rule 3.850. And this appears to be a similar tactic by him. He's very familiar with the system. His Rule 3.850 has been pending, and for him to now fake total ignorance, it's been going on four years. He's fully aware. He has been brought down here a number of times.

The defendant met with family members, Mr. Bowen, Ms. Greenberg and Ms. Jacobs, and withdrew his request. That was approximately a year later that he did the same thing, was again brought down to Dade County, was

brought in front of Judge Glick, at which point he refused to directly answer Judge Glick's inquiry, and it was from Judge Glick who directed him to stop playing games, and within ten days he recused himself in the case.

The defendant is perfectly capable of manipulating the system, delaying the proceedings, and what he has said today and yesterday appears to be another attempt by him to delay. There is proceedings in the file, a Post Conviction Motion. He is competent and he does know what is going on. And now that there is [p. 51] finally some resolution in sight of the motion, he has to come up with some other attempt to delay the proceedings further.

THE COURT: Let me ask you a few more questions. You have heard everything that both of the attorneys have said. I just want to make sure I understand. Some of these questions are repetitive.

Number one, Mr. Bowen has been involved in your case from the beginning. Do you understand that?

THE DEFENDANT: I understand that.

THE COURT: Okay. It is my understanding that you understand that although Mr. Bowen has not had personal contact with you during that period of time because Ms. Jacobs and Ms. Greenberg probably agreed because of the fact that they live closer to you, that they would be the liaison between you.

Do you understand that?

THE DEFENDANT: Uh-huh.

THE COURT: Is that a yes? Yes or no?

THE DEFENDANT: What was that again?

THE COURT: I need you to say yes or no. I do not understand what uh-huh means.

[p. 52] THE DEFENDANT: Yes.

THE COURT: For the record, you have to say yes or no.

THE DEFENDANT: Yes.

THE COURT: Do you understand that yesterday I found that Mr. Bowen does in fact offer you efficient assistance of counsel, and you have presented nothing to me that would make me believe that he cannot effectively represent you, and that he has been effectively representing you to date? Do you understand that?

THE DEFENDANT: Uh-huh.

THE COURT: Yes or no?

THE DEFENDANT: Yes.

THE COURT: And I assume you understand, as well, that I told you I am not going to appoint another attorney to represent you?

THE DEFENDANT: I respected your opinion and anything that you rule on because that's your work. But I have been transported here without being informed that I had anything, without having been prepared for anything. If I was over there or if I had been informed that in time that my attorneys had withdrawn from the case, I would have had time to prepare, legally.

[p. 53] The Florida Bar should investigate this man. How is it that he resolved that he be accepted and practice a capital case, death case here in Florida? Under what circumstances? Under what laws where applied if he had to be assisted by people that were competent and legalized in the capital case in the State of Florida? Or how is it correct?

I would have had the right to have taken him for having presented being competent to represent a capital case when never in his life he has practiced or studied criminal law or had any experience in death penalty cases. What can he base himself on?

THE COURT: Let me say this. Let me interrupt you for a minute. I am not going to re-litigate the issue that I already decided on. I understand what your opinion is. I have heard you. I have done an inquiry with Mr. Bowen. I do not find it rises to the level of ineffective assistance of counsel. I have read the pleadings that he has written. I have heard him [sic] arguments, in both by himself and in conjunction with the other two attorneys that you were perfectly satisfied with.

[p. 54] I find it difficult to believe that these two attorneys did not discussion [sic] with you that they were going to withdraw, in light of the fact that they represented to me that they had in fact discussed it with you, and you acknowledged that you understood what happened. So you know very well, Mr. Sanchez-Velasco, that they were withdrawing from the case. There is no doubt about that. Is that right?

THE DEFENDANT: That I knew?

THE COURT: Yes.

THE DEFENDANT: That who was?

THE COURT: Ms. Jacobs and Ms. Greenberg.

THE DEFENDANT: I know that Congress, the Federal Government was paying for my representation since that V.R.C. was created. The Governor gives me the right that I be represented – 3.850 Motion, post conviction, be represented by an attorney competent in capital case. It's a law. And I have a right that the Governor gives me to create V.R.C.

THE COURT: You have an attorney representing you who I find to be competent. The only issue now is that whether or not you are competent to waive representation of counsel in [p. 55] order to represent yourself and whether or not you want to withdraw your Rule Three.

I am just going to say one final thing to you; and that is, that I would hate to think that you would do something because you are angry or have some sort of personality conflict with your attorney that would ultimately result in your own death. If you want to go to the electric chair, that certainly is your choice. I find it hard to believe that you want to do that. Mr. Bowen has done everything he can do up to this point to make sure that that does not happen, and to effectively represent you, and I do not want to think that either a moment or a period of time that you are just being angry or perhaps a little stubborn and electing to do something along those lines.

So I will ask you once again whether your choice is to represent yourself and withdraw the motion, because I do find the fact that you are competent to waive counsel,

should you choose to do so. And I am basing that on my viewing of you in the courtroom, my discussions with you, all the answers that you have given me to my questions. I am also basing it on the evaluation [p. 56] that was conducted over last night and also the evaluation that I have read from the University of Florida, College of Medicine, that was done in Gainesville by Doctor Greer who evaluated you in November of last year, 1995, who also found you competent and kind of said the same thing that the doctor last night said. It is your choice.

What do you want to do?

THE DEFENDANT: It's my Right to represent myself and to withdraw my 3.850 Motion. And I hope that you grant it. It's my own will, and I'm competent to make my own decisions, and that I'm thankful for your consent, but it's my decision.

THE COURT: Is there anything else I need to do? Anything else?

THE DEFENDANT: Legally, I have the right to do so.

THE COURT: I am going to give everybody a minute in case there is anything else they want me to add.

The only thing I would ask the State is to ask me not to ask the same questions again.

MS. GAY: If Your Honor is satisfied that his last statements are an unequivocal request to [p. 57] withdraw the motion, that he is not conditioned upon some of

the earlier discussions that he has had that he is unequivocally saying, I want to withdraw the 3.850 Motion, that I understand my execution could proceed forthwith, that you would notify the Governor, or the State Attorney's Office could notify the Governor, or that there are no matters and none that would be entertained under the Rules of Procedure in the future, and he still wishes to withdraw the motion.

THE COURT: Yes. I am convinced of that.

MS. GAY: Then we have no other inquiry.

THE COURT: I find that the defendant does understand the consequences of waiving his Right to counsel, that he is competent to do so, that he further understands the affect of withdrawing his motion, and in waiving his Right to any further appeal. I am going to allow him to do so. I will order corrections to return him to wherever he came from; Stark, I guess.

Good luck, sir.

THE DEFENDANT: Thank you very much.

MS. GAY: May the State prepare a Motion to Dismiss his motion?

I'll provide an order to Your Honor by the [p. 58] first of next week so the motion that is currently before Your Honor will be dismissed. Actually, it could be dismissed without prejudice.

THE COURT: I do not know if he is withdrawing it.

MS. GAY: I guess an order requesting his order to withdraw it.

THE COURT: Yes. I will prepare it. Good luck.

MR. BOWEN: May I ask that a copy of the order be provided to me?

THE COURT: I will.

THE DEFENDANT: I will be sent to where I'm supposed to be?

THE COURT: You will be sent back. I am going to just direct that you be returned from, I guess –

THE DEFENDANT: To death row.

MS. GAY: To Stark.

THE COURT: I thought you were pending trial?

MS. GAY: It's still in Brevard County.

THE DEFENDANT: I was sentenced to the death sentence in Florida State Prison.

[p. 59] THE COURT: I am going to direct you to be sent back there.

THE DEFENDANT: I have no more pending?

THE COURT: No, you do not.

Court is in recess.

(Thereupon, the proceedings were concluded.)

[p. 60] CERTIFICATE

STATE OF FLORIDA (
(ss.
COUNTY OF DADE (

I, MICHELLE R. VENDITTI, Court Reporter and Notary Public in and for the State of Florida at Large, do hereby certify that the foregoing proceedings had in the cause of STATE OF FLORIDA versus RIGOBERTO SANCHEZ-VELASCO, Case Number F86-37102, heard before the Honorable VICTORIA PLATZER, is a true and correct transcript held at the time and place stated herein.

I WITNESS MY HAND, and affix my official seal this 4th day of November, 1996.

/s/ Michelle R. Venditti
MICHELLE R. VENDITTI
Reporter

(Seal) OFFICIAL NOTARY SEAL
MICHELLE R. VENDITTI
COMMISSION NUMBER
CC319669
MY COMMISSION EXP.
SEPT 28, 1997

Supreme Court, U.S.
FILED
JUN 15 1998
CLERK

CASE NO. 97-1702
IN THE UNITED STATES SUPREME COURT
October Term 1997

RIGOBERTO SANCHEZ-VELASCO,
Petitioner,

vs.

THE STATE OF FLORIDA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(Restated)

[Capital Case]

I.

Whether counsel, who has been discharged, has standing to file proceedings on behalf of the nominal petitioner, who has been determined to be competent, and who has not assented to this proceeding?

II.

Whether former counsel's claims regarding Mr. Sanchez-Velasco's waiver of counsel present a question of federal law, where he had no federal constitutional right to counsel and where his claim is premised only upon the assertion that the state-court factual finding of competence that was supported by the opinions of ten (10) expert witnesses is incorrect?

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CASE NO. 97-1702
IN THE UNITED STATES SUPREME COURT
October Term 1997

RIGOBERTO SANCHEZ-VELASCO,
Petitioner,

vs.

THE STATE OF FLORIDA,
Respondent.

OPINION BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is reported as Sanchez-Velasco v. State, 702 So. 2d 224 (Fla. 1997). Parallel citation will be made to the opinion as published in the appendix to the petition, thus: "Pet. App. ___."

JURISDICTION

The Petition claims jurisdiction pursuant to 28 U.S.C. §1257(a). Respondent submits that because Mr. Bowen was dismissed as counsel in the state trial court, and has failed to demonstrate that the nominal petitioner, Mr. Sanchez-Velasco, desires that this petition be pursued, and has also failed to establish any basis for standing to bring this petition as a "next friend," the Court is without jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

The issues presented in this capital case allegedly involve the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

The Florida Supreme Court set forth the following facts regarding Defendant's crime and the trial proceedings in the opinion under review:

> In summary, Sanchez-Velasco resided with Marta Molina in Hialeah. On December 12, 1986, Molina left her eleven-year-old daughter in the care of Sanchez-Velasco. Molina returned home from work that evening to find that her daughter had been murdered. Sanchez-Velasco was not at the apartment. The victim's face was swollen, and she was naked and bleeding from her vagina. A medical examination concluded that the victim was raped and that strangulation was the cause of her death. Missing from Molina's apartment were the victim's gold chains, her identification bracelet, and Molina's fur coat. Sanchez-Velasco was located by the police and questioned about the murder. Following proper Miranda warnings, Sanchez-Velasco confessed to robbery, rape, and murder. Sanchez-Velasco also remarked that he would prefer to be executed immediately rather than "rot in jail." The jury found Sanchez-Velasco guilty of first-degree murder, sexual battery of a victim under twelve years of age, and theft as a lesser included offense of grand theft. Upon the conclusion of the penalty phase, the jury recommended the death penalty by a vote of eight to four, and the judge imposed a sentence of death for the first-degree murder conviction.

> In his sentencing order, the trial judge found the following two aggravating circumstances: (1) the capital felony was especially heinous, atrocious, or cruel, and (2) the capital felony was committed while the defendant was engaged in the commission of a sexual battery. The judge found no statutory or nonstatutory mitigating circumstances. The judge explained in his order why he did not find Sanchez-Velasco's mental condition to be a mitigating circumstance.

Sanchez-Velasco v. State, 702 So. 2d 224, 225 (Fla. 1997)(footnote omitted)[Pet. App. 3-4]. On direct appeal, Mr. Sanchez-Velasco had raised six issues, all of which the Florida Supreme Court found to be without merit. Sanchez-Velasco v. State, 570 So. 2d 908, 916 (Fla. 1990). Mr. Sanchez-Velasco sought certiorari review of that decision, which was denied on May 13, 1991. Sanchez-Velasco v. Florida, 500 U.S. 929 (1991).

In the opinion under review, the Florida Supreme Court also noted that Mr. Sanchez-Velasco had been unanimously adjudged competent by several mental health professions during his trial:

> Sanchez-Velasco's competency to stand trial and waive certain rights was evaluated numerous times during the proceedings below. A pretrial mental health examination demonstrated that Sanchez-Velasco was competent at the time of the crime and competent to stand trial. A competency evaluation ordered by the trial judge during the trial again demonstrated that Sanchez-Velasco was competent to stand trial. During the penalty phase, a defense psychiatrist testified that Sanchez-Velasco suffered from an emotional disturbance, but was legally sane. Prior to sentencing, a second defense psychiatrist testified that Sanchez-Velasco possibly suffered from a neuropsychological dysfunction, but was legally competent at the time of the examination. By the conclusion of the trial, Sanchez-Velasco had

> been examined by no less than eight mental health experts, all of whom found him to be competent to proceed.

Sanchez-Velasco, 702 So. 2d at 225-26 [Pet. App. 4].

On May 13, 1993, Mr. Sanchez-Velasco, through counsel, and filed a Motion to Vacate Judgment of Conviction and Sentence, asserting sixteen claims. In relation thereto Defendant was examined by two doctors hired by his post-conviction counsel. The Florida Supreme Court noted their findings in the opinion under review:

> In support of the rule 3.850 motion, the defense retained Dr. Jorge Herrera and Dr. Alec Whyte to evaluate Sanchez-Velasco. Drs. Herrera and Whyte determined that Sanchez-Velasco suffered from significant psychological disorders. The defense planned to present the doctors' testimony at the rule 3.850 hearing to rebut the previous competency determinations.

Sanchez-Velasco, 702 So. 2d at 226 [Pet. App. 5]. The court also noted that Mr. Sanchez-Velasco had been examined in another then-pending murder case:

> During this same time period, Sanchez-Velasco underwent a competency evaluation by Dr. Richard Greer in connection with a separate murder trial in Broward County. Dr. Greer found Sanchez-Velasco competent in that case to represent himself and enter a guilty plea.

Id.[1]

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[1] The opinion contains a typographical error: the record reflects that Mr. Sanchez-Velasco was facing charges in Bradford, not Broward, County.

On March 31, 1994, and again on April 28, 1994, Mr. Sanchez-Velasco wrote to Florida Governor Lawton Chiles, requesting that no further appeals be undertaken on his behalf. (S.R. 10-12). Circuit Judge Thomas Wilson thereafter had three experts appointed to examine Mr. Sanchez-Velasco for competency, and set the matter for hearing on May 19, 1994. (R. 13). On that date, Mr. Sanchez-Velasco's brother, Fernando Sanchez, through Mr. Bowen, filed a petition in the Florida Supreme Court "as next friend" seeking to stay the proceedings "and all further proceedings which will expedite his execution." (Petition for Writ of Prohibition at 6-7). The Florida Supreme Court denied the petition on May 20, 1994. Sanchez v. Wilson, 639 So. 2d 980 (Fla. 1994). On May 23, 1994, Mr. Sanchez-Velasco withdrew his initial request to waive post-conviction proceedings.[2] (R. 763). On June 6, 1994, Judge Wilson recused himself and Judge Leonard Glick was assigned the case. (R. 13). On June 20, 1995, Mr. Sanchez-Velasco again wrote to the Governor, seeking to waive his post-conviction proceedings. (R. 776). On October 3, 1995, the trial court granted the State's motion to have Mr. Sanchez-Velasco colloquied on the issue. (1995 T. 4). On October 16, 1995, Mr. Sanchez-Velasco's counsel filed a petition for extraordinary relief in the Florida Supreme Court, seeking to prevent the colloquy. The petition was denied. Sanchez-Velasco v. Glick, 666 So. 2d 144 (Fla. 1995). On October 17, 1995, the trial court went forward with the colloquy of Mr. Sanchez-Velasco. (1995 T. 5, 9). After Mr. Sanchez-Velasco repeatedly declined to respond to a question propounded by him, Judge Glick concluded that Mr. Sanchez-Velasco was not "sincere" in his desire to waive his post-conviction appeals, and ordered the State to file a response to the Fla. R. Crim. P. 3.850 motion. (1995 T. 16-20, 22). After noting these proceedings the Florida Supreme Court concluded "that Sanchez-Velasco's own attorneys endeavored to ensure that none of the requests [by Mr. Sanchez-Velasco to waive collateral appeals]

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[2] Mr. Sanchez-Velasco subsequently explained that he withdrew the request to dismiss the motion at that time because when he was brought to Miami, his attorneys "surrounded him" with his entire family "young and old," who begged him to change his mind about giving up his appeals. (1995 T. 12).

were honored." Sanchez-Velasco, 702 So. 2d at 226 [Pet. App. 6].

On December 6, 1995, pursuant to a defense motion, Judge Glick recused himself. (R. 786, 842). Judge Victoria Platzer was assigned to the case. After the State filed its response, and the defense filed a reply, Judge Platzer held a hearing on August 29, 1996, and entered orders granting an evidentiary hearing as to two of the R. 3.850 claims and summarily denying the remainder. Sanchez-Velasco, 702 So. 2d at 226 [Pet. App. 5]. Prior to the scheduled evidentiary hearing, however Mr. Sanchez-Velasco again sought to discharge counsel:

> On October 24, 1996, Sanchez-Velasco moved to discharge his post-conviction counsel, Michael Bowen. Sanchez-Velasco claimed that Bowen could not effectively represent him because Bowen had only minimal contact with him, was not familiar with Florida law, and primarily practiced civil law. Sanchez-Velasco referred to Bowen as his "enemy," and asked the judge to force Bowen to stay at a distance from him 'before a misfortune could take place." Sanchez-Velasco also sought to have his rule 3.850 motion withdrawn and his execution expedited.

Id. The Florida Supreme Court detailed the subsequent proceedings in the opinion under review:

> Immediately following Sanchez-Velasco's motion, the trial judge questioned Bowen and determined that he was not ineffective in his representation. The judge then told Sanchez-Velasco that she would not appoint another attorney to represent him, and that he could either represent himself or continue with Bowen as his attorney. Sanchez-Velasco responded, "The reason I'm here right now is because I don't need an attorney. I don't want him, nor do I want any other attorney, nor have I asked the Court for another attorney." The judge stated, "He appears very intelligent to me," but

> ordered an emergency competency evaluation before she ruled on whether Sanchez-Velasco could represent himself and waive his appeals. The next day, Dr. Sonia Ruiz personally interviewed and evaluated Sanchez-Velasco.

702 So. 2d at 226 [Pet. App. 7]. Dr. Ruiz issued a four-page, single-spaced report. The Florida Supreme Court quoted from her summarized conclusions:

> It is this evaluator's opinion that this defendant is fully competent to proceed. He has a factual and rational understanding of the proceedings. He has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding. He appreciates the possible consequences of his decisions. He has the ability to manifest appropriate courtroom behavior. He has the capacity to testify relevantly in his behalf. There is no major mental illness noted. No overt thought disorder was present at the time of this examination. The defendant does not appear to suffer from a major mood disorder, such as major depression. He has no cognitive deficits. There are no apparent neurological deficits. His thoughts are clear and related in a coherent fashion. He did not express any suicidal or homicidal ideations. His affect and mood were deemed to be appropriate. No major mental illness or defect is deemed to be present that could interfere with his capacity to reasonably assist counsel

> or himself in his defense. No psychiatric interventions are deemed to be necessary at this time.

702 So. 2d at 226-27 [Pet. App. 7]. After Dr. Ruiz examined Mr. Sanchez-Velasco, the trial judge again colloquied him, as set forth in the opinion below:

> On October 25, 1996, the trial judge questioned Sanchez-Velasco to determine if he understood the consequences of waiving his post-conviction counsel and proceedings. The judge explored Sanchez-Velasco's age, education and employment history. The judge asked if Sanchez-Velasco understood that if he prevailed on the rule 3.850 motion he would be entitled to a new sentencing hearing. Sanchez-Velasco replied that he understood. The judge explained that by withdrawing the rule 3.850 motion his right to any further appeals would be forever lost, and again recommended that he represent himself or allow Bowen to represent him. Sanchez-Velasco stated that he understood the judge would not appoint another attorney for him, and that he did not want Bowen to serve as his attorney. Sanchez-Velasco then told the judge, "It's my right to represent myself and to withdraw my 3.850 motion. And I hope that you grant it. It's my own will, and I'm competent to make my own decisions, and that I'm thankful for your consent, but it's my decision."

702 So. 2d at 227 [Pet. App. 7-8]. As noted in the opinion, the trial judge then determined that the evidence showed Mr. Sanchez-Velasco to be competent to waive his counsel and collateral appeals:

> On the basis of Dr. Ruiz's evaluation, the 1995 evaluation by Dr. Greer, and the colloquy, the trial judge found Sanchez-Velasco competent to dismiss his counsel and withdraw his rule 3.850 motion. The judge's order concluded as follows:

> The Court finds that the Defendant is well-aware and fully understands the consequences of his actions. The Court further finds that the Defendant has sufficient mental capacity, education and life experience to appreciate the nature of the proceedings and the consequences of withdrawing the Rule 3.850 and in representing himself.
>
> The Court finds the Defendant has freely, voluntarily, knowingly and intelligently waived his right to counsel for his collateral appeal. The Court further finds the Defendant, representing himself, has intelligently and knowingly moved to withdraw his Motion for Post-Conviction Relief and that the Defendant has the "right to control his own destiny to whatever extent remains." Durocher v. Singletary, 623 So.2d 482 (Fla.1993), at 484.

Sanchez-Velasco, 702 So. 2d at 227 [Pet. App. 8].

Mr. Bowen appealed to the Florida Supreme Court, which summarized his claims as follows:

> Bowen, Sanchez-Velasco's former counsel, now appeals the trial judge's order. Bowen claims that Dr. Ruiz's competency evaluation, upon which the trial judge's order was based in part, was facially deficient and Sanchez-Velasco was actually incompetent to represent himself and withdraw his rule 3.850 motion. Bowen asserts that Sanchez-Velasco's competency was placed in legitimate doubt at the hearing of October 24, 1996,

> when he simultaneously demanded to (1) dismiss Bowen due to ineffectiveness in pressing his post-conviction appeal and to (2) withdraw his post-conviction appeal. Bowen contends that Sanchez-Velasco's incompetence is demonstrated by the fact that his two demands are in diametric contradiction. Bowen claims it was this contradiction that likely prompted the trial judge to order Sanchez-Velasco's competency evaluation. Bowen asserts that the report submitted by Dr. Ruiz was insufficient because it failed to discuss or analyze this evidence of Sanchez-Velasco's incompetency. Bowen concludes that the order of the trial court cannot be sustained because it is based in part on the deficient competency report.

702 So. 2d at 227 [Pet. App. 8-9]. The Florida Supreme Court found these claims to be without basis:

> We disagree that Dr. Ruiz's report was deficient and find no reasonable basis for any doubt concerning Sanchez-Velasco's competency to dismiss his attorney and withdraw his post-conviction motion.

702 So. 2d at 227 [Pet. App. 9]. The court then reviewed its holding in Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993), which provided that when a capital defendant expresses a desire to dismiss collateral counsel and proceedings, the judge must conduct a "Faretta-type evaluation" to ascertain whether the defendant understands the consequences of his request. Sanchez-Velasco, 702 So. 2d at 228 [Pet. App. 9-10]. The court further noted that a competency evaluation was required only if, after inquiry, the trial court had "doubt" as to the defendant's competency. 702 So. 2d at 228 [Pet. App. 10], citing Durocher, 623 So. 2d at 483. The court concluded that the trial court had complied with Durocher:

> The trial judge fully followed the procedure outlined in Durocher in determining Sanchez-Velasco's competency to proceed.

Following Sanchez-Velasco's motion, the judge thoroughly explored his education and experience, and repeatedly stressed the implications of dismissing his collateral appeal. The judge determined that Sanchez-Velasco appeared to be "very intelligent" and "very competent." The record discloses that the judge then ordered the competency evaluation, not because she had a reasonable doubt as to Sanchez-Velasco's competency, but in an abundance of caution because Sanchez-Velasco was requesting to be put to death. The evaluation conducted by Dr. Ruiz was comprehensive and responsive to the needs of the trial court. Dr. Ruiz inquired about Sanchez-Velasco's childhood, education, employment history, religious beliefs, criminal history, relationship with his attorney, and decision to expedite his execution. Dr. Ruiz concluded in the report:

> Overall, this defendant presents as an individual who is fully competent to proceed with legal matters. There is no major mental disorder noted. There is no thought disorder, nor any major mood disorder evidenced at this time. He is able to reason properly, without any mental illness or defect interfering with his capacity to assist counsel or himself in his defense.

Upon receiving the report, the judge stated that Dr. Ruiz's findings and conclusions supported her own belief that Sanchez-Velasco was competent to make his own legal decisions. Dr. Ruiz's evaluation was consistent with nine other competency determinations. The judge's determination of competency was also supported by the fact that Sanchez-Velasco arrived at the hearing with a

> presumption of competence attributable to the previous determinations of his competency. See Whitmore v. Arkansas, 495 U.S. 149 (1990); Hunter v. State, 660 So. 2d 244 (Fla.1995); Durocher, 623 So. 2d at 484. The judge then discharged Bowen as Sanchez-Velasco's counsel and dismissed the rule 3.850 motion.

Sanchez-Velasco, 702 So. 2d at 228 [Pet. App. 10-11]. The Florida Supreme Court therefore rejected Mr. Bowen's claim that Dr. Ruiz's report failed to address the purported contradictions between Mr. Sanchez-Velasco's claims:

> We find that, to the extent such a contradiction may exist, it does not in and of itself lead us to doubt Sanchez-Velasco's competence in the face of at least ten evaluations determining him to be competent. Our decision in Durocher requires a mental health evaluation only when the Faretta-type evaluation leaves the judge with doubts as to the defendant's competency. Here, the record discloses that the judge had no such doubts but merely ordered the evaluation in an abundance of caution. In effect, she was making certain her conclusions were correct as well as consistent with prior competency determinations.

Sanchez-Velasco, 702 So. 2d at 228 [Pet. App. 11-12]. The court therefore affirmed the order of the trial court discharging Mr. Bowen and dismissing his rule 3.850 motion. 702 So. 2d at 228 [Pet. App. 12].

On or about January 29, 1998, Mr. Bowen filed a petition for writ of certiorari in this Court, seeking to proceed in forma pauperis. No affidavit of indigency was filed, apparently because Mr. Sanchez-Velasco declined to execute it.[3] This Court therefore denied the

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[3] See ¶¶5-6 of Mr. Bowen's Motion to Direct Clerk to File Request to Proceed in Forma Pauperis Without Petitioner's Affidavit, dated

motion to proceed in forma pauperis on February 2, 1998. The instant petition was then filed on or about April 10, 1998. The Court has ordered the State to file its brief in opposition by June 16, 1998.

February 18, 1998.

REASONS FOR DENYING THE WRIT

I. **MR. BOWEN LACKS STANDING TO FILE PROCEEDINGS ON BEHALF OF THE NOMINAL PETITIONER, WHO HAS BEEN DETERMINED TO BE COMPETENT, AND WHO HAS NOT ASSENTED TO THIS PROCEEDING.**

II. **MR. BOWEN'S CLAIMS DO NOT PRESENT A QUESTION OF FEDERAL LAW, WHERE HIS ONLY CHALLENGE IS TO THE STATE-COURT FACTUAL FINDINGS REGARDING THE WAIVER OF A STATE RIGHT.**

I.
MR. BOWEN LACKS STANDING TO FILE PROCEEDINGS ON BEHALF OF THE NOMINAL PETITIONER, WHO HAS BEEN DETERMINED TO BE COMPETENT, AND WHO HAS NOT ASSENTED TO THIS PROCEEDING.

In Whitmore v. Arkansas, 495 U.S. 149, 155 (1990), this court held that before the merits of an issue may be considered, the "litigant must clearly and specifically set forth facts sufficient" to show that the litigant has standing. Further, the Court "is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." Whitmore, 495 U.S. at 155-56. Mr. Bowen prefaces his petition with a plain statement that it is he, not the nominal petitioner, Mr. Sanchez-Velasco, who is seeking review:

> Michael Bowen, as special appointed post-conviction counsel for Rigoberto Sanchez-Velasco, movant, in the trial court and appellant in the Florida Supreme Court, respectfully petitions this Court ...

(Pet. 1).[4] Despite his self-characterization as appointed counsel, Mr. Bowen was in fact discharged of his duties as counsel in the state trial court, and that order was affirmed on appeal by the Florida Supreme Court. Mr. Bowen wholly fails to even allege any basis for his continued "representation" of Mr. Sanchez-Velasco. At best, then, Mr. Bowen is filing this petition as "next friend." Yet he proffers no grounds upon which such status might be conferred. Thus, there are no "allegations of standing" upon which this Court could "embellish" even were it authorized to do so. Under Whitmore, it follows that Mr. Bowen has no standing to prosecute the instant petition.

Whitmore is factually quite similar to this case. To the degree the cases differ, the instant case presents a more compelling basis for rejecting Mr. Bowen's petition.[5] In Whitmore, the defendant, Simmons, was convicted and sentenced to death. At the time of sentencing, Simmons professed a desire to waive all appeals. Pursuant to established state procedure, the trial court conducted a competency evaluation and determined that Simmons's waiver was knowing and intelligent. No direct appeal was taken to the Arkansas Supreme Court beyond review of the adequacy of the waiver inquiry. The inquiry was found valid by that court, and Whitmore, as "next friend," sought certiorari review in this Court.

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[4] As noted in the statement of the case, there is further evidence of Mr. Bowen's role as an intermeddler in Mr. Sanchez-Velasco's apparent refusal to execute an IFP affidavit.

[5] Unlike in Arkansas, direct appeal of a death sentence may not be waived in Florida. Farr v. State, 656 So. 2d 448, 450 (Fla. 1995). While in Whitmore the defendant had waived his right to direct appeal, here, Mr. Sanchez-Velasco's conviction and sentence of death have already been challenged on direct appeal. The Florida Supreme Court reviewed the proceedings and record and determined them to be valid. Sanchez-Velasco v. State, 570 So. 2d 908 (Fla. 1990). This Court declined to review that determination. Sanchez-Velasco v. Florida, 500 U.S. 929 (1991). As such, Mr. Bowen's right to intervene for the purpose of carrying out another round of assaults on presumptively valid conviction and sentence is even less substantial.

In the case at bar, Mr. Sanchez-Velasco professed a desire during the state-court post-conviction proceedings to waive any further challenges to his conviction and sentence, and to discharge collateral counsel. As in Whitmore, the trial court, following the established state procedure for such cases,[6] conducted a competency evaluation and determined that Sanchez-Velasco's waiver was knowing and intelligent. As in Whitmore, the Florida Supreme Court reviewed the adequacy of the waiver inquiry, and found the waiver valid. Sanchez-Velasco v. State, 702 So. 2d 224, 228 (Fla. 1997) [Pet. App. 12]. Now, as in Whitmore, Mr. Bowen, acting essentially as a purported "next friend," seeks certiorari review in this Court. For the reasons expressed in Whitmore, the petition should be denied.

In Whitmore, the court noted that in the habeas context, next friend" status "is by no means granted automatically to whomever seeks to pursue an action on behalf of another." 459 U.S. at 163. Rather, there must be some significant relationship between the next friend and the real party in interest, and the next friend has the burden "clearly to establish the propriety of the status and thereby justify the jurisdiction of the court." 459 U.S. at 164. These requirements exist to prevent the filing of federal claims by "intruders or uninvited meddlers." Id. Without deciding whether next-friend status was ever available absent statutory authorization, the Court concluded that any common-law right to such status would not be any broader than that permitted in the habeas context. 495 U.S. at 164-65. As such, one seeking the status may proceed only on a showing that "the real party in interest is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability." 495 U.S. at 165.

In Whitmore, the Court concluded that the prerequisite for standing was not met where the state-court hearing established that the defendant had made a knowing, voluntary and intelligent waiver of his right to proceed. The Court noted that Arkansas required a competency hearing as a matter of state law. The Court further

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[6] See Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993).

observed that the state supreme court had affirmed the trial court's finding that the defendant was competent, and declined to disturb that judgment, despite counsel's claim that the waiver was invalid. Id. The Court therefore dismissed the petition for lack of standing. 495 U.S. 166.

As in Whitmore, the trial court here conducted a competency-to-waive inquiry pursuant to state law. As in that case, the trial court's determination was affirmed over counsel's claim that the waiver was invalid.[7] And, as in that case, there is no basis to disturb the state court findings that Mr. Sanchez-Velasco was competent to waive any further remedies.[8] As Defendant is competent, Mr. Bowen lacks standing,[9] and this petition should be dismissed.

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[7] The State did not challenge Mr. Bowen's standing to bring the appeal in the Florida Supreme Court, despite his dismissal as counsel at that point because the procedure dictated by that court in Durocher appears to contemplate review of the waiver proceedings. Neither the state-court procedures nor the State's acquiescence to Mr. Bowen's "representation" of Mr. Sanchez-Velasco in a state proceeding can confer jurisdiction on this Court, however. Notably, in the opinion of which he seeks review, Mr. Bowen is referred to as "former counsel" by the Florida Supreme Court. Sanchez-Velasco, 702 So. 2d at 227 [Pet. App. 8].

[8] See Point II, infra.

[9] There has also been no showing that Mr. Bowen possesses some "special relationship" with Mr. Sanchez-Velasco justifying his self-anointed role as next friend.

II.
MR. BOWEN'S CLAIMS DO NOT PRESENT A QUESTION OF FEDERAL LAW, WHERE HIS ONLY CHALLENGE IS TO THE STATE-COURT FACTUAL FINDINGS REGARDING THE WAIVER OF A STATE RIGHT.

Assuming, arguendo, that Mr. Bowen had standing to bring this petition, his claims would be without merit. He fails to explain how proceedings surrounding the waiver of counsel, in a context where there is no federal constitutional right to counsel, could violate Mr. Sanchez-Velasco's federal constitutional rights. Even assuming, arguendo, that the waiver implicated federal rights, Mr. Bowen raises no objection to the legal premises applied by the court below. Rather, his complaint is with the factual findings reached in the trial and appellate state courts. Claims of this sort rarely present a basis for review in this Court. Moreover, the substance of Mr. Bowen's factual claims, that Mr. Sanchez-Velasco was not competent to waive his rights, is also without merit where ten experts have examined him and determined him to be competent.

Mr. Bowen's entire argument is premised upon the notion that the waiver of state-court post-conviction counsel is governed by the Sixth Amendment of the United States Constitution. The soundness of that premise is by no means apparent, and Mr. Bowen fails to cite any authority supporting it.

This Court has held there is no federal constitutional right to counsel in state-court post-conviction proceedings. Pennsylvania v. Finley, 481 U.S. 551, 555-57 (1987); Coleman v. Thompson, 501 U.S. 722, 752 (1991)(no right to post-conviction counsel in capital proceedings). In Finley, this court also rejected the contention that once the state has granted such a right, the contours of that right are dictated by federal law. 481 U.S. at 558-59. Moreover, in Coleman, the court further clarified that where there is no Sixth Amendment right to counsel, no claim predicated on the Sixth Amendment may be asserted. 501 U.S. at 753. Mr. Bowen's reliance on Godinez v. Moran, 509 U.S. 389 (1993), is thus misplaced. The waiver-of-counsel aspect of that case is squarely based upon Faretta v.

California, 422 U.S. 806 (1972), Godinez, 509 U.S. at 399, which in turn rests on the Sixth Amendment. Faretta, 422 U.S. at 818.

Finally, in Finley, the Court concluded that where the right to post-conviction counsel is created by a state, its courts are the sole arbiters of whether the right had been satisfied. 481 U.S. 564. Below, the Florida Supreme Court determined that the trial court had properly complied with its holding in Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993), which governs the waiver of post-conviction capital counsel in Florida, in determining that Mr. Sanchez-Velasco was competent to waive Mr. Bowen's assistance. Plainly no federal question is presented, and the petition should be denied. Coleman, 501 U.S. at 729 ("this Court has no power to review a state law determination that is sufficient to support the judgment").

Even were a colorable Sixth Amendment issue presented, Mr. Bowen does not fault the procedure prescribed by the Florida Supreme Court in Durocher for determining the competence of a capital defendant to waive collateral review of his sentence.[10] Rather, his complaint is that the state courts should not have credited the multitude of experts who have examined Mr. Sanchez-Velasco and determined him to be competent. This Court has traditionally granted great deference to the states regarding the factual determination of competence. See Demosthenes v. Baal, 495 U.S. 731, 736-37 (1990)(federal appellate court erred in reweighing evidence of defendant's competency to waive post-conviction remedies after state court had found him competent); Maggio v. Fulford, 462 U.S. 111, 117-18 (1983)(federal appellate court erred in reweighing evidence of defendant's competency to stand trial after state court had found him competent). Although these habeas cases involve the application of the presumption of correctness under 28 U.S.C. §2254(d), they do establish that competence vel non is an issue of fact. This court generally defers to factual findings fairly supported by the record on

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[10] To the extent that he is claiming that the state-court procedure was inadequate, that claim is still based upon a factual premise that was rejected below: that there was a legitimate doubt as to Mr. Sanchez-Velasco's competency, as is discussed, infra.

direct review of state-court decisions as well. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"); Arizona v. Fulminante, 499 U.S. 279, 287 (1991)("We normally give great deference to the factual findings of the state court"); Tison v. Arizona, 481 U.S. 137, 151 (1987)("We take the facts as the [state] Supreme Court has given them to us"); Barclay v. Florida, 463 U.S. 939, 947 (1983)(opinion of Rehnquist, J.)(Supreme Court's review of state court findings under state law "is limited to the question of whether they are so unprincipled or arbitrary as to somehow violate the United States Constitution"); California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 111-12 (1980)("we customarily accept the factual findings of state courts in the absence of 'exceptional circumstances'"); Exxon Co., U.S.A. v. Sofec, Inc., 116 S. Ct. 1813, 1819 (1996)("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"). Given the abundant evidence of competence, it cannot be concluded that the Florida Supreme Court's application of its rule in Durocher was arbitrary. The petition thus fails to present any valid basis for this Court to accept review.

At the time of his trial, Mr. Sanchez-Velasco was examined by no less that 8 experts, none of whom was of the opinion that Mr. Sanchez-Velasco was incompetent. Sanchez-Velasco, 702 So. 2d at 225-26 [Pet. App. 4]. The Florida Supreme Court also cited the conclusion of competency of Dr. Richard Greer, Chief of the Division of Forensic Psychiatry at the University of Florida, who had examined Mr. Sanchez-Velasco in relation to his Bradford County case eleven months before the Durocher hearing and specifically found him to be competent. 702 So. 2d at 226, 227 [Pet. App. 5, 8], (S.R. 17). In view of the foregoing, Mr. Sanchez-Velasco plainly arrived at the Durocher hearing with a presumption of competency. Sanchez-Velasco, 702 So. 2d at 227 [Pet. App. 11]; Hunter v. State, 660 So. 2d 244, 248 (Fla. 1995), cert. denied, 116 S. Ct. 946 (1996);

Durocher, 623 So. 2d at 484.[11] The Florida Supreme Court properly concluded that nothing that had occurred in the trial court would have caused a reasonable jurist to question Mr. Sanchez-Velasco's competence. As such, no further inquiry into Mr. Sanchez-Velasco's competency was required. See Durocher, 623 So. 2d at 485 (mandating a competency hearing only if a question arose in the judge's mind as to the defendant's competency); Drope v. Missouri, 420 U.S. 162, 180 (1975)(requiring inquiry only where circumstances create "sufficient doubt" as to defendant's competency); Godinez v. Moran, 509 U.S. at 398 (the level of competence required to waive counsel is the same as that required to stand trial). Nevertheless, despite her own expressed lack of doubt as to Mr. Sanchez-Velasco's competence, Sanchez-Velasco, 702 So. 2d at 228 [Pet. App. 10], the trial judge, in an abundance of caution, had Mr. Sanchez-Velasco examined by yet a tenth expert, who also concluded that Mr. Sanchez-Velasco was competent. With that opinion, combined with the court's own observations that Mr. Sanchez-Velasco appeared intelligent and aware of what was going on, the court concluded he was competent. 702 So. 2d at 228 [Pet. App. 11]. This fully complied with both Durocher and Drope.

In assessing competency, the question is whether the defendant had a sufficient reasonable degree of rational understanding of the proceedings. Godinez, 509 U.S. at 402 ("Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings"). Here, based upon the reports of ten experts, as well as its own observations, the trial court reasonably concluded that Mr. Sanchez-Velasco was competent. The Florida Supreme Court's own precedent requires that where the trial court had the opportunity to observe the defendant's behavior, to review documents written by the defendant, and review the proffer of expert evidence, the trial court's finding of competency will not be disturbed, absent evidence which "dispositively demonstrates" incompetence. Muhammad v. State, 494 So. 2d 969, 972-73 (Fla. 1986), cert. denied, 479 U.S. 1101 (1987); Watts v. State, 593 So.

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[11] Such a presumption does not violate the constitution. See Whitmore; Medina v. California, 505 U.S. 437, 453 (1992).

2d 198, 201 (Fla.)(upholding finding of competency as not abuse of discretion; noting that counsel never challenged qualifications of experts below), cert. denied, 505 U.S. 1210 (1992). Mr. Bowen at no point in the trial court challenged that conclusion beyond his assertion that Mr. Sanchez-Velasco's requests were contradictory. Nor did he present evidence on appeal that "dispositively demonstrate[d]" that Defendant was not competent.

Thus, Mr. Bowen's central premise -- that Mr. Sanchez-Velasco's competency was "legitimately in doubt," (Pet. 13), is flawed. The only alleged evidence of incompetency cited by Mr. Bowen is the purported contradiction between Mr. Sanchez-Velasco's assertion that Mr. Bowen was not competent and his desire to terminate the proceedings. This alleged contradiction is not as irrational as Mr. Bowen would portray it to be. The hearing in question was the result of Mr. Sanchez-Velasco's fourth request to forego further proceedings. At the time of his initial request, Mr. Sanchez-Velasco was returned to Dade County for the purpose of determining his wishes. By Mr. Sanchez-Velasco's own description, his counsel then arranged to have all his family members, "young and old," surround him and persuade him, through emotion and guilt, to withdraw his request to terminate his appeals. (1995 T. 12). At the time of the second hearing regarding Mr. Sanchez-Velasco's waiver of his appeals, the VLRC attorneys filed a petition in the Florida Supreme Court seeking to prevent the trial court from colloquying him on the issue, and they and Mr. Bowen asserted that Mr. Sanchez-Velasco was not competent. (1996 T. 15). The latter action was a particular bone of contention Mr. Sanchez-Velasco had with Mr. Bowen's performance. (1996 T. 13). By the time of the hearing under review, the VLRC lawyers had withdrawn from representing Mr. Sanchez-Velasco due to their organization's demise. (R. 884-87).

With the VLRC attorneys gone, the only impediment to Mr. Sanchez-Velasco carrying out his desire to terminate the appeals process was Mr. Bowen. Seeking to have Mr. Bowen discharged, on whatever grounds were available, was therefore a rational way to achieve his oft-stated goal of ending the post-conviction proceedings. By all accounts, Mr. Sanchez-Velasco is intelligent, if unschooled in the law. His complaints against Mr. Bowen were factually grounded,

if ultimately legally unsound.[12] Tellingly, Mr. Sanchez-Velasco concluded his complaints concerning Mr. Bowen with the assertion that he wanted Mr. Bowen discharged and to waive his post-conviction rights. (1996 T. 11). Upon the court's suggestion that he consult with Mr. Bowen prior to seeking to waive his appeals, Mr. Sanchez-Velasco again asserted that he did not want or need an attorney:

> THE DEFENDANT: I appreciate your honor's intentions, but the reason I'm here right now is because I don't need an attorney. I don't want him, nor do I want any other attorney, nor have I asked the Court for another attorney.

(1996 T. 19)(emphasis supplied). Later, during the Durocher colloquy, Mr. Sanchez-Velasco again asserted that he only wanted the attorneys to leave him alone and let him die in peace. (1996 T. 40).

Rather than the contradiction Mr. Bowen asserts, Mr. Sanchez-Velasco has consistently and repeatedly sought to waive his appeals. His attorneys have just as consistently and repeatedly sought to prevent that from happening. As such Mr. Sanchez-Velasco's attempt to get Mr. Bowen removed on the pretext of incompetence was wholly consistent and reasonable. Likewise, Mr. Sanchez-Velasco's perception of Mr. Bowen, who has sought to thwart his wishes at every turn, as his "enemy" is hardly remarkable. See also Medina v. Singletary, 59 F.3d 1095, 1107 (11th Cir 1995)(bizarre or irrational behavior cannot be equated with mental incompetence to proceed), cert. denied, 116 S. Ct. 2505 (1996); Hernandez-Hernandez v. United States, 904 F.2d 758, 761 (1st Cir. 1990)(rejecting argument similar to that presented by Mr. Bowen

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[12] Mr. Sanchez-Velasco asserted that Mr. Bowen was unqualified because he was not admitted in the State of Florida, primarily practiced civil law, lacked capital case experience, and had had little contact with Mr. Sanchez-Velasco, the witnesses, or Mr. Sanchez-Velasco's family. (1996 T. 3, 9-10). The trial court rejected, upon Mr. Bowen's responses, the claim that Mr. Bowen was not competent. The factual bases of Mr. Sanchez-Velasco's claim were not refuted, only the legal conclusions. (1996 T. 14-18).

because it "would require a competency inquiry in virtually every case in which an accused person makes a decision perceived by others as being unwise"). Finally, to the extent Mr. Bowen is suggesting that Mr. Sanchez-Velasco's incompetency should be presumed from his desire to forego further appeals, that notion has been squarely rejected:

> The idea that the deliberate decision of one under sentence of death to abandon possible additional legal avenues of attack on that sentence cannot be a rational decision, regardless of motive, suggests that preservation of one's own life at whatever cost is the summum bonum, a proposition with respect to which the greatest philosophers and theologians have not agreed and with respect to which the United States Constitution by its terms does not speak.

Lenhard v. Wolff, 443 U.S. 1306, 1312-13 (1979)(Rehnquist, J.).

Nor do the cited reports of Drs. Whyte and Herrera meet Mr. Bowen's burden of dispositively demonstrating incompetence. First of all, at no time during the proceedings below did Mr. Bowen call them to the attention of the trial court. Moreover, these reports, particularly given the ten disinterested expert opinions to the contrary, are highly suspect. They alone of the opinions in the record were the product of experts hired by Mr. Sanchez-Velasco's post-conviction counsel. Further, their analysis of Mr. Sanchez-Velasco's competence in no way addressed the specific criteria for competence set forth in the Florida Rules of Criminal Procedure or Dusky v. United States, 362 U.S. 402 (1960). Rather, their conclusion that Mr. Sanchez-Velasco was incompetent at the time of trial was based largely upon their belief that Mr. Sanchez-Velasco was administered Thorazine on a daily basis at the time of trial. There has been no suggestion whatsoever that Mr. Sanchez-Velasco was being administered any psychotropic medications at the time of the 1996 proceedings. Indeed, Dr. Greer, who reviewed Mr. Sanchez-Velasco's prison medical records did not observe that Mr. Sanchez-Velasco was on any

medication at the time.[13] Further, these doctors' conclusion that Mr. Sanchez-Velasco suffered from various mental disorders (contrary to the findings of the other, non-partisan, experts) is not in itself relevant to the question of whether Mr. Sanchez-Velasco was competent. Medina, 59 F.3d at 1107 (not every manifestation of mental illness demonstrates incompetence; evidence must indicate present inability to understand the charges to support finding of incompetence); Coleman v. Saffle, 912 F.2d 1217, 1226 (10th Cir.)(no competency hearing was required despite evidence of previous hospitalization and mental illness where experts opined defendant was competent), cert. denied, 497 U.S. 1053 (1990); United States v. Pryor, 960 F.2d 1, 2 (1st Cir. 1992)(not determinative that defendant had drug problems and psychiatric treatment in the past).

Both Dr. Whyte and Dr. Herrera further based their belief that Mr. Sanchez-Velasco was incompetent upon Mr. Sanchez-Velasco's allegedly inappropriate courtroom behavior and disregard of counsel's advice. However, these factors, without more, also do not raise questions sufficient to raise questions of mental competency. Neither doctor persuasively related just how these alleged problems would have prevented Mr. Sanchez-Velasco from being able to knowingly and intelligently waive the right to counsel.

Finally, the cases upon which Mr. Bowen relies, in which no competency evaluation was conducted, despite the issue of competency having been raised, have no relevance to the issue Mr. Bowen posits. For example, in Griffin v. Lockhart, 935 F.2d 926 (8th Cir. 1991), habeas relief was granted where the defendant moved prior to arraignment for a mental examination pursuant to Arkansas statutory provisions. The three doctors who examined the defendant were unable to reach a consensus as to their conclusions, and recommended further testing. Id. at 927-28. The defendant subsequently, against

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[13] Moreover, the defense experts' belief that Mr. Sanchez-Velasco was being medicated at the time of trial is not supported by any record evidence beyond the affidavit (also not brought to the trial court's attention) of an inmate who was also in the Dade County Jail in 1986.

the advice of counsel, withdrew the motion and proceeded to trial. Id. at 928. On the eve of trial, counsel again raised the issue of the defendant's competency. After merely asking the defendant how he felt about the competency issue, the court directed the trial to proceed. Id. Under these circumstances, the Circuit Court concluded that the defendant should have had a competency hearing. Id. at 930. The Eighth Circuit specifically noted that under its own precedent, in nearly every case where the denial of a competency hearing had been upheld, "'there was some form of psychiatric evidence'" that indicated to the court "'the absence of mental illness.'" Id. (quoting Harkins v. Wyrick, 552 F.2d 1308, 1311 (8th Cir. 1977)). Here, nine mental health professionals, all concluded before the Durocher hearing that Mr. Sanchez-Velasco was competent. An evidentiary hearing was held during trial, and the court concluded Mr. Sanchez-Velasco was competent. Thus unlike in Griffin, but more like Harkins, there was ample basis to have forgone a hearing. See also Treadwell v. Lockhart, 948 F.2d 453, 454 (8th Cir. 1991)(distinguishing Griffin where "a reasonable judge" would not have entertained doubt as to the defendant's competency where counsel presented no such evidence to the trial court). Mr. Bowen presents no authority that can be reasonably read as requiring more than that which the trial court did below. Mr. Bowen certainly did not in any way suggest to the trial court that he felt its procedures were inadequate. See Watts v. Singletary, 87 F.3d 1282, 1288 (11th Cir. 1996)(defense counsel's failure to raise issue at trial level was indicative of the lack of necessity for further competency proceedings), cert. denied, 117 S. Ct. 2440 (1997); United States v. Garrett, 903 F.2d 1105, 1117 (7th Cir.)(same), cert. denied, 498 U.S. 905 (1990); Cf. Griffin (counsel consistently objected to the procedure followed by the trial court); with United States v. Premachandra, 32 F.3d 346, 348 (8th Cir. 1994)(distinguishing Griffin where trial experts agreed defendant was competent and defense counsel did not request hearing in trial court). The Florida Supreme Court therefore properly followed state law, and affirmed. See Medina v. California, 505 U.S. 437, 451 (1992)("Consistent with our precedents, it is enough that the State affords the criminal defendant on whose behalf a plea of incompetence is asserted a reasonable opportunity to demonstrate that he is not"). In view of the foregoing, Mr. Bowen's postulation that a competency hearing was required is simply without merit.

In view of the foregoing, to the extent that he has even asserted the violation of any federal right, it is apparent that Mr. Bowen's real complaint is not with the state courts' procedures, but their factual findings. However, the state courts properly concluded, based on the record, that Mr. Sanchez-Velasco was competent, and that his waiver of collateral counsel and appeals was knowing, intelligent, and voluntary. Those factual findings should not be disturbed here, and Mr. Bowen's petition should be denied.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court DENY the petition for writ of certiorari.

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